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S. HRG. 108–61

TRIBAL ENERGY SELF-SUFFICIENCY ACT AND THE NATIVE AMERICAN ENERGY DEVELOPMENT AND SELF-DETERMINATION ACT

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

S. 424

TO ESTABLISH, REAUTHORIZE, AND IMPROVE ENERGY PROGRAMS RELATING TO INDIAN TRIBES

AND

S. 522

TO AMEND THE ENERGY POLICY ACT OF 1992 TO ASSIST INDIAN TRIBES IN DEVELOPING ENERGY RESOURCES

MARCH 19, 2003
WASHINGTON, DC

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CONTENTS

APPENDIX

INDIAN ENERGY LEGISLATION, S. 434, THE TRIBAL ENERGY SELF-SUFFICIENCY ACT, AND S. 522, THE NATIVE AMERICAN ENERGY DEVELOPMENT AND SELF-DETERMINATION ACT OF 2003

WEDNESDAY, MARCH 19, 2003

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:30 p.m. in room 485, Senate Russell Building, Hon. Ben Nighthorse Campbell, (chairman of the committee) presiding.

Present: Senators Campbell, Inouye, and Thomas.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. The Committee on Indian Affairs will be in session.

Good afternoon, and welcome to the committee's hearing on two Indian energy bills, S. 424 introduced on February 14 by Senator Bingaman, and S. 522, which I introduced on March 5. Within hours, our Nation will be embroiled in apparently a major ground war in the Middle East and in recent weeks, world oil prices have soared to $40 per barrel. I think America has to kick the habit on depending on foreign energy and start producing more of its own energy. One answer to our energy future is in the domestic production, and I just don't mean in ANWR either. That is going to be subject to a vote at 3 o'clock, by the way.

Indian-owned energy resources are still largely undeveloped—1.81 million acres are being explored or in production, but about 15 million more acres of energy resources are undeveloped. I believe the chart out front here shows a little bit more of what I am trying to describe.

There are 90 tribes that own significant energy resources, both renewable and nonrenewable. Many of them want to develop those resources. Today we will hear from the Bush administration and tribal witnesses. I certainly welcome all committee members.

[Text of S. 424 and S. 522 follow:]

II

108TH CONGRESS
1ST SESSION

S. 424

To establish, reauthorize, and improve energy programs relating to Indian tribes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 14, 2003

Mr. BINGAMAN (for himself, Mr. INOUYE, Mr. CAMPBELL, and Mr. DASCHLE) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

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A BILL

To establish, reauthorize, and improve energy programs relating to Indian tribes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Tribal Energy Self-Sufficiency Act''.

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

SEC. 2. DEFINITION OF SECRETARY.

In this Act, the term ''Secretary'' means the Secretary of Energy.

TITLE I—INDIAN ENERGY

SEC. 101. COMPREHENSIVE INDIAN ENERGY PROGRAM.

Title XXVI of the Energy Policy Act of 1992 (25 U.S.C. 3501 et seq.) is amended by adding after section 2606 the following:

''SEC. 2607. COMPREHENSIVE INDIAN ENERGY PROGRAM.

''(a) DEFINITIONS.—In this section:

''(1) DIRECTOR.—The term 'Director' means the Director of the Office of Indian Energy Policy and Programs of the Department of Energy.

''(2) INDIAN LAND.—The term 'Indian land' means—

''(A) any land within the limits of an Indian reservation, pueblo, or rancheria;

''(B) any land not within the limits of an Indian reservation, pueblo, or rancheria, title to which is held—

''(i) in trust by the United States for the benefit of an Indian tribe;

''(ii) by an Indian tribe subject to restriction by the United States against alienation; or

''(iii) by a dependent Indian community; and

''(C) land conveyed to an Alaska Native corporation under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.).

''(b) INDIAN ENERGY EDUCATION PLANNING AND MANAGEMENT ASSISTANCE.—

''(1) IN GENERAL.—The Director shall establish programs within the Office of Indian Energy Policy and Programs to assist Indian tribes in meeting energy education, research and development, planning, and management needs.

''(2) GRANTS.—In carrying out this section, the Director may provide grants, on a competitive basis, to an Indian tribe for use in carrying out—

''(A) renewable energy, nonrenewable energy, energy efficiency, and energy conservation programs;

''(B) studies and other activities supporting tribal acquisition of energy supplies, services, and facilities;

''(C) planning, construction, development, operation, maintenance, and improvement of tribal electrical generation, transmission, and distribution facilities located on Indian land; and

''(D) development, construction, and interconnection of electric power transmission facilities located on Indian land with other electric transmission facilities.

''(3) FORMULA.—

''(A) IN GENERAL.—The Director may develop, in consultation with Indian tribes, a formula for providing grants under this section.

''(B) CONSIDERATIONS.—In developing a formula under subparagraph (A), the Director may take into account—

''(i) the number of acres of Indian land owned by an Indian tribe;

''(ii) the number of households on the Indian land of an Indian tribe;

''(iii) the number of households on the Indian land of an Indian tribe that have no electric service or are underserved; and

''(iv) financial or other assets available to the Indian tribe from any source.

''(4) PRIORITY.—In providing a grant under this subsection, the Director shall give priority to an application received from an Indian tribe with inadequate electric service (as determined by the Director).

''(5) REGULATIONS.—The Secretary may promulgate such regulations as the Secretary determines are necessary to carry out this subsection.

''(6) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to the Secretary to carry out this section $20,000,000 for each of fiscal years 2003 through 2010.

''(c) LOAN GUARANTEE PROGRAM.—

''(1) AUTHORITY.—Subject to paragraph (3), the Secretary may provide loan guarantees (as defined in section 502 of the Federal Credit Reform Act of 1990 (2 U.S.C. 661a) for not more than 90

percent of the unpaid principal and interest due on any loan made to any Indian tribe for—

''(A) energy development (including the planning, development, construction, and maintenance of electrical generation plants); and

''(B) for transmission and delivery mechanisms for electricity produced on Indian land.

''(2) LENDERS.—A loan guaranteed under this subsection shall be made by—

''(A) a financial institution subject to examination by the Secretary; or

''(B) an Indian tribe, from funds of the Indian tribe.

''(3) LIMITATION ON AMOUNT.—The aggregate outstanding amount guaranteed by the Secretary of Energy at any time under this subsection shall not exceed $2,000,000,000.

''(4) REGULATIONS.—The Secretary may promulgate such regulations as the Secretary determines are necessary to carry out this subsection.

''(5) FUNDING.—

''(A) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as are necessary to carry out this subsection.

''(B) AVAILABILITY.—Funds made available under subparagraph (A) shall remain available until expended.

''(d) INDIAN ENERGY PREFERENCE.—

''(1) IN GENERAL.—A Federal agency or department may give, in the purchase of electricity, oil, gas, coal, or any other energy product or byproduct, preference in the purchase to an energy and resource production enterprise, partnership, corporation, or other type of business organization the majority of the interest in which is owned and controlled by an Indian tribe.

''(2) PRICE OF PRODUCTS.—In carrying out this subsection, a Federal agency or department shall—

''(A) pay not more than the prevailing market price for an energy product or byproduct; and

''(B) shall obtain not less than existing market terms and conditions.''.

SEC. 102. OFFICE OF INDIAN ENERGY POLICY AND PROGRAMS.

(a) IN GENERAL.—Title II of the Department of Energy Organization Act (7 U.S.C. 7131 et seq.) is amended by adding at the end the following:

"SEC. 217. OFFICE OF INDIAN ENERGY POLICY AND PROGRAMS.

''(a) ESTABLISHMENT.—

''(1) IN GENERAL.—There is established within the Department an Office of Indian Energy Policy and Programs (referred to in this section as the 'Office').

''(2) DIRECTOR.—The Office shall be headed by a Director, who shall be—

''(A) appointed by the Secretary; and

''(B) compensated at a rate equal to that of level IV of the Executive Schedule under section 5315 of title 5, United States Code.

''(b) DUTIES OF DIRECTOR.—The Director shall—

''(1) in accordance with Federal policies for the promotion of tribal sovereignty and self-determination, provide, direct, foster, coordinate, and implement energy planning, education, management, conservation, and delivery programs of the Department that—

''(A) promote tribal energy efficiency and use;

''(B) modernize and develop, for the benefit of Indian tribes, tribal energy and economic infrastructure relating to natural resource development and electrification;

''(C) lower or stabilize energy costs; and

''(D) electrify tribal land and the homes of tribal members; and

''(2) carry out the duties assigned to the Secretary or the Director under title XXVI of the Energy Policy Act of 1992 (25 U.S.C. 3501 et seq.).''.

(b) CONFORMING AMENDMENTS.—

(1) AUTHORIZATION OF APPROPRIATIONS.—Section 2603 of the Energy Policy Act of 1992 (25 U.S.C. 3503) is amended by striking subsection (c) and inserting the following:

''(c) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to the Secretary to carry out this section $10,000,000 for each of fiscal years 2003 through 2010.''.

(2) TABLE OF CONTENTS.—The table of contents of the Department of Energy Organization Act (42 U.S.C. prec. 7101) is amended—

(A) in the item relating to section 209, by striking ''Section'' and inserting ''Sec.''; and

(B) by striking the items relating to sections 213 through 216 and inserting the following:

''Sec. 213. Establishment of policy for National Nuclear Security Administration.
''Sec. 214. Establishment of security, counterintelligence, and intelligence policies.
''Sec. 215. Office of Counterintelligence.

(3) EXECUTIVE SCHEDULE.—Section 5315 of title 5, United States Code, is amended by inserting ''Director, Office of Indian Energy Policy and Programs, Department of Energy.'' after ''Inspector General, Department of Energy.''.

SEC. 103. SITING OF ENERGY FACILITIES ON TRIBAL LAND.

(a) DEFINITIONS.—In this section:

(1) INDIAN TRIBE.—

(A) IN GENERAL.—The term ''Indian tribe'' means any Indian tribe, band, nation, or other organized group or community that is recognized as being eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(B) EXCLUSIONS.—The term ''Indian tribe'' does not include any Regional Corporation or Native Corporation (as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602)).

(2) INTERESTED PARTY.—The term ''interested party'' means a State or other person the interests of which could be adversely affected by a decision of

an Indian tribe to grant a lease or right-of-way in accordance with this section.

(3) PETITION.—The term ''petition'' means a written request submitted to the Secretary for the review of an action (including inaction) of an Indian tribe that is claimed to be in violation of tribal regulations approved under subsection (f).

(4) RESERVATION.—The term ''reservation'' means—

(A) with respect to a reservation in a State other than the State of Oklahoma, all land that has been set aside or that has been acknowledged as having been set aside by the United States for the use of an Indian tribe, the exterior boundaries of which are more particularly defined in a final tribal treaty, agreement, executive order, Federal statute, secretarial order, or judicial determination; and

(B) with respect to a reservation in the State of Oklahoma, all land that is—

(i) within the jurisdictional area of an Indian tribe; and

(ii) within the boundaries of the last reservation of the Indian tribe that was es-

tablished by treaty, executive order, or secretarial order.

(5) SECRETARY.—The term 'Secretary' means the Secretary of the Interior.

(6) TRIBAL LAND.—The term 'tribal land' means any—

(A) tribal trust land; or

(B) other land owned by an Indian tribe that is located within the reservation of the Indian tribe.

(b) LEASES INVOLVING ELECTRIC GENERATION, TRANSMISSION, DISTRIBUTION, OR PROCESSING FACILITIES.—

(1) IN GENERAL.—An Indian tribe may grant a lease of tribal land for—

(A) an electric generation, transmission, or distribution facility; or

(B) a facility to refine or otherwise process renewable or nonrenewable energy resources developed on tribal land.

(2) APPROVAL NOT REQUIRED.—A lease described in paragraph (1) shall not require the approval of the Secretary if—

(A) the lease is executed under tribal regulations approved by the Secretary under this subsection; and

(B) the term of the lease does not exceed 30 years.

(c) RIGHTS-OF-WAY FOR ELECTRIC GENERATION, TRANSMISSION, DISTRIBUTION, OR PROCESSING FACILITIES.—An Indian tribe may grant a right-of-way over tribal land for a pipeline or an electric transmission or distribution line without separate approval by the Secretary if—

(1) the right-of-way is executed under and complies with tribal regulations approved by the Secretary;

(2) the term of the right-of-way does not exceed 30 years; and

(3) the pipeline or electric transmission or distribution line serves—

(A) an electric generation, transmission or distribution facility located on tribal land; or

(B) a facility located on tribal land that refines or otherwise processes renewable or nonrenewable energy resources developed on tribal land.

(d) VALIDITY OF LEASES AND RIGHTS-OF-WAY.—No lease or right-of-way granted under this section shall be valid unless authorized in compliance with applicable tribal regulations approved under subsection (f).

(e) RENEWALS.—Leases or rights-of-way entered into under this section may be renewed at the discretion of the Indian tribe making the grant of the lease or right-of-way in accordance with this section.

(f) TRIBAL REGULATION REQUIREMENTS.—

(1) IN GENERAL.—The Secretary shall approve or disapprove tribal regulations required under this subsection.

(2) CONDITIONS FOR APPROVAL.—The Secretary shall approve tribal regulations described in paragraph (1) if the Secretary determines that the regulations—

(A) are comprehensive in nature;

(B) include provisions that address—

(i) securing necessary information from the lessee or right-of-way applicant;

(ii) the term of any conveyance;

(iii) amendments and renewals;

(iv) consideration for a lease or right-of-way;

(v) technical or other relevant requirements;

(vi) requirements for environmental review as described in paragraph (3);

(vii) requirements for complying with all applicable environmental laws;

(viii) the identification of final approval authority; and

(ix) the provision of public notification of final approvals; and

(C) establish a process for consultation with any affected States concerning potential off-reservation impacts associated with a lease or right-of-way proposed to be granted.

(3) ENVIRONMENTAL REVIEW PROCESS.—An Indian tribe shall establish an environmental review process that includes—

(A) an identification and evaluation of all significant environmental impacts of the proposed action as compared to a no action alternative;

(B) identification of proposed mitigation;

(C) a process for ensuring that the public is informed of and has an opportunity to com-

ment on the proposed action prior to tribal approval of the lease or right-of-way; and

(D) sufficient administrative support and technical capability to carry out the environmental review process.

(4) PERIOD FOR APPROVAL OR DISAPPROVAL.—

(A) IN GENERAL.—Not later than 270 days after the date of submission by an Indian tribe to the Secretary of tribal regulations under this subsection, the Secretary—

(i) may provide notice and an opportunity for public comment on the regulations; and

(ii) shall approve or disapprove the regulations.

(B) FORM OF DISAPPROVAL.—Any disapproval by the Secretary of tribal regulations described in subparagraph (A) shall be accompanied by—

(i) written documentation that describes the basis for the disapproval; and

(ii) a description of changes or other actions required to address concerns of the Secretary.

(C) EXTENSION.—The Secretary may extend the deadline specified in subparagraph (A) for an Indian tribe after consultation with the Indian tribe.

(5) DUTIES OF INDIAN TRIBE.—If an Indian tribe executes a lease or right-of-way in accordance with tribal regulations required under this subsection, the Indian tribe shall provide to the Secretary—

(A) a copy of the lease or right-of-way document (including all amendments and renewals to the lease or document); and

(B) in the case of tribal regulations or a lease or right-of-way that permits payment to be made directly to the Indian tribe, documentation of the payments sufficient to enable the Secretary to discharge the trust responsibility of the United States as appropriate under applicable law.

(6) NO LIABILITY FOR LOSSES.—The United States shall not be liable for any loss sustained by any party (including any Indian tribe or member of an Indian tribe) to a lease executed in accordance with tribal regulations under this subsection.

(7) VIOLATIONS.—

(A) PETITIONS.—

(i) IN GENERAL.—An interested party may, after exhaustion of tribal remedies, submit to the Secretary, in a timely manner, a petition for the review of compliance of an Indian tribe with any tribal regulations approved under this subsection.

(ii) DEADLINE FOR CONDUCT OF REVIEW.—The Secretary shall conduct any such review under clause (i) as the Secretary determines to be necessary not later than 90 days after the date of receipt of a petition described in clause (i).

(B) DETERMINATION OF VIOLATION.—If, on completion of a review of tribal regulations under subparagraph (A), the Secretary determines that the regulations were violated, the Secretary may take such action as the Secretary determines to be necessary to remedy the violation, including—

(i) rescinding or holding any applicable lease or right-of-way in abeyance until the violation is cured; and

(ii)(I) rescinding the approval of the tribal regulations; and

(II) reassuming responsibility for approval of leases or rights-of-way associated with the facilities covered by those leases or rights-of-way.

(C) ACTIONS OF SECRETARY.—If the Secretary seeks to remedy a violation described in subparagraph (A), the Secretary shall—

(i) make a written determination with respect to the regulations that have been violated;

(ii) provide to the applicable Indian tribe a written notice of the violation and a copy of the written determination described in clause (i); and

(iii) prior to the exercise of any remedy or the rescission of the approval of the regulations involved and reassumption of responsibility for approval of any lease or right-of-way, provide for the Indian tribe a hearing and a reasonable opportunity to cure the alleged violation.

(D) APPEAL.—An Indian tribe that is determined by the Secretary under this paragraph to have violated tribal regulations under this subsection shall retain all rights to appeal as

provided by regulations promulgated by the Secretary.

(g) AGREEMENTS.—

(1) IN GENERAL.—An agreement between an Indian tribe and a business entity that is directly associated with the development of an electric generation, transmission, or distribution facility, or a facility to refine or otherwise process renewable or nonrenewable energy resources developed on tribal land, shall not require the separate approval of the Secretary in accordance with section 2103 of the Revised Statutes (25 U.S.C. 81) if the activity that is the subject of the agreement has been the subject of an environmental review process under subsection (f)(3).

(2) NO LIABILITY FOR LOSS.—The United States shall not be liable for any loss sustained by any party (including any Indian tribe or member of an Indian tribe) associated with an agreement entered into under this subsection.

(h) NO EFFECT ON OTHER LAW.—Nothing in this section modifies or otherwise affects the applicability of any provision of—

(1) the Act of May 11, 1938 (commonly known as the ''Indian Mineral Leasing Act of 1938'') (25 U.S.C. 396a et seq.);

(2) the Indian Mineral Development Act of 1982 (25 U.S.C. 2101 et seq.);

(3) the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.); or

(4) any environmental law of the United States.

SEC. 104. INDIAN MINERAL DEVELOPMENT REVIEW.

(a) IN GENERAL.—The Secretary of the Interior shall conduct a review of the activities that, as of the date of enactment of this Act, have been carried out by governments of Indian tribes under the Indian Mineral Development Act of 1982 (25 U.S.C. 2101 et seq.).

(b) REPORT.—Not later than 1 year after the date of enactment of this Act, the Secretary of the Interior shall submit to the Committee on Indian Affairs and the Committee on Energy and Natural Resources of the Senate and the Committee on Resources of the House of Representatives a report that describes—

(1) the results of the review;

(2) recommendations to ensure that Indian tribes have the opportunity to develop nonrenewable energy resources; and

(3) an analysis of the barriers to the development of energy resources on Indian land, including Federal policies and regulations and recommendations regarding the removal of those barriers.

(c) CONSULTATION.—In developing the report and recommendations under this section, the Secretary of the Interior shall consult with Indian tribes on a government-to-government basis.

SEC. 105. RENEWABLE ENERGY STUDY.

(a) IN GENERAL.—Not later than 2 years after the date of enactment of this Act, and once every 2 years thereafter, the Secretary shall submit to the Committee on Energy and Natural Resources and the Committee on Indian Affairs of the Senate and the Committee on Energy and Commerce and the Committee on Resources of the House of Representatives a report that—

(1) describes energy consumption and renewable energy development potential on Indian land;

(2) identifies barriers to the development of renewable energy by Indian tribes, including Federal policies and regulations; and

(3) makes recommendations regarding the removal of those barriers.

(b) CONSULTATION.—In developing the report and recommendations under this section, the Secretary shall

consult with Indian tribes on a government-to-government basis.

SEC. 106. FEDERAL POWER MARKETING ADMINISTRATIONS.

Title XXVI of the Energy Policy Act of 1992 (25 U.S.C. 3501 et seq.) (as amended by section 101) is amended by adding at the end the following:

"SEC. 2608. FEDERAL POWER MARKETING ADMINISTRATIONS.

''(a) DEFINITIONS.—In this section:

''(1) ADMINISTRATOR.—The term 'Administrator' means—

''(A) the Administrator of the Bonneville Power Administration; and

''(B) the Administrator of the Western Area Power Administration.

''(2) POWER MARKETING ADMINISTRATION.—The term 'power marketing administration' means—

''(A) the Bonneville Power Administration;

''(B) the Western Area Power Administration; and

''(C) any other power administration the power allocation of which is used by or for the benefit of an Indian tribe located in the service area of the administration.

''(b) ENCOURAGEMENT OF INDIAN TRIBAL ENERGY DEVELOPMENT.—Each Administrator shall encourage Indian tribal energy development by taking such actions as are appropriate, including administration of programs of the Bonneville Power Administration and the Western Area Power Administration, in accordance with this section.

''(c) ACTION BY THE ADMINISTRATOR.—In carrying out this section—

''(1) each Administrator shall consider the unique relationship that exists between the Federal Government and Indian tribes;

''(2) power allocations from the Western Area Power Administration to Indian tribes may be used to firm Indian-owned renewable energy projects for delivery of loads located on Indian land; and

''(3) the Administrator of the Western Area Power Administration may purchase renewable or nonrenewable power from Indian tribes to meet the firming requirements of the Western Area Power Administration.

''(d) ASSISTANCE FOR TRANSMISSION SYSTEM USE.—

''(1) IN GENERAL.—An Administrator may provide technical assistance to Indian tribes seeking to

use the high-voltage transmission system for delivery of electric power.

''(2) COSTS.—The costs of technical assistance provided under paragraph (1) shall be funded—

''(A) by the Administrator using non-reimbursable funds appropriated for that purpose; or

''(B) by the applicable Indian tribes.

''(3) PRIORITY FOR ASSISTANCE FOR TRANSMISSION STUDIES.—In providing discretionary assistance to Indian tribes under paragraph (1), each Administrator shall give priority in funding to Indian tribes that have limited financial capability to acquire that assistance.

''(e) POWER ALLOCATION STUDY.—

''(1) IN GENERAL.—Not later than 2 years after the date of enactment of this section, the Secretary of Energy shall submit to the Committee on Energy and Natural Resources and the Committee on Indian Affairs of the Senate and the Committee on Energy and Commerce and the Committee on Resources of the House of Representatives a report that—

''(A) describes the use by Indian tribes of Federal power allocations of the Western Area

Power Administration (or power sold by the Southwestern Power Administration) and the Bonneville Power Administration to or for the benefit of Indian tribes in service areas of those administrations; and

"(B) identifies—

"(i) the quantity of power allocated to Indian tribes by the Western Area Power Administration;

"(ii) the quantity of power sold to Indian tribes by other power marketing administrations; and

"(iii) barriers that impede tribal access to and use of Federal power, including an assessment of opportunities—

"(I) to remove those barriers; and

"(II) improve the ability of power marketing administrations to facilitate the use of Federal power by Indian tribes.

"(2) CONSULTATION.—In developing the report under paragraph (1), each power marketing administration shall consult with Indian tribes on a government-to-government basis.

''(f) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to the Secretary of Energy to carry out this section $750,000 for each of fiscal years 2003 through 2013.''.

SEC. 107. FEASIBILITY STUDY FOR COMBINED WIND AND HYDROPOWER DEMONSTRATION PROJECT.

(a) STUDY.—The Secretary, in coordination with the Secretary of the Army and the Secretary of the Interior, shall conduct a study of the cost and feasibility of developing a demonstration project that would use wind energy generated by Indian tribes and hydropower generated by the Army Corps of Engineers on the Missouri River to supply firming power to the Western Area Power Administration.

(b) SCOPE OF STUDY.—The study shall—

(1) determine the feasibility of the blending of wind energy and hydropower generated from the Missouri River dams operated by the Army Corps of Engineers;

(2) review historical purchase requirements and projected purchase requirements for firming and the patterns of availability and use of firming energy;

(3) assess the wind energy resource potential on tribal land and projected cost savings through a blend of wind and hydropower over a 30-year period;

(4) include a preliminary interconnection study and a determination of resource adequacy of the Upper Great Plains Region of the Western Area Power Administration;

(5) determine seasonal capacity needs and associated transmission upgrades for integration of tribal wind generation; and

(6) include an independent tribal engineer as a study team member.

(c) REPORT.—Not later than 1 year after the date of enactment of this Act, the Secretary and Secretary of the Army shall submit to Congress a report that describes the results of the study, including—

(1) an analysis of the potential energy cost savings to the customers of the Western Area Power Administration through the blend of wind and hydropower;

(2) an evaluation of whether a combined wind and hydropower system can reduce reservoir fluctuation, enhance efficient and reliable energy production, and provide Missouri River management flexibility;

(3) recommendations for a demonstration project that could be carried out by the Western Area Power Administration in partnership with an

Indian tribal government or tribal government energy consortium to demonstrate the feasibility and potential of using wind energy produced on Indian land to supply firming energy to the Western Area Power Administration or any other Federal power marketing agency; and

(4) an identification of—

(A) the economic and environmental benefits to be realized through such a Federal-tribal partnership; and

(B) the manner in which such a partnership could contribute to the energy security of the United States.

(d) CONSULTATION.—In developing the report and recommendations under this section, the Secretary and the Secretary of the Army shall consult with applicable Indian tribes on a government-to-government basis.

(e) FUNDING.—

(1) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this section $500,000, to remain available until expended.

(2) NONREIMBURSABILITY OF COSTS.—All costs incurred by the Western Area Power Adminis-

tration in carrying out this section shall be non-reimbursable.

SEC. 108. TRANSMISSION LINE DEMONSTRATION PROJECT.

The Dine Power Authority, an enterprise of the Navajo Nation, shall be eligible to receive grants and other assistance under the demonstration program authorized by section 2603 of the Energy Policy Act of 1992 (25 U.S.C. 3503) for activities associated with the development of a transmission line from the Four Corners Area to southern Nevada, including related power generation opportunities.

TITLE II—RENEWABLE ENERGY AND RURAL CONSTRUCTION GRANTS

SEC. 201. RENEWABLE ENERGY PRODUCTION INCENTIVE.

(a) INCENTIVE PAYMENTS.—Section 1212(a) of the Energy Policy Act of 1992 (42 U.S.C. 13317(a)) is amended in the third and fourth sentences by striking ''payment and which satisfies'' and all that follows through ''Secretary shall establish.'' and inserting the following: ''payment. The Secretary shall establish other procedures necessary for efficient administration of the program. The Secretary shall not establish any criteria or procedures that have the effect of assigning to proposals a higher or lower priority for eligibility or allocation of

appropriated funds on the basis of the energy source proposed.''.

(b) QUALIFIED RENEWABLE ENERGY FACILITY.—Section 1212(b) of the Energy Policy Act of 1992 (42 U.S.C. 13317(b)) is amended—

(1) by striking ''a State or any political'' and all that follows through ''nonprofit electrical cooperative'' and inserting the following: ''a nonprofit electrical cooperative, a public utility, a State, territory, or possession of the United States, the District of Columbia (or a political subdivision of a State, territory, or possession or the District of Columbia), or an Indian tribal government (or subdivision of an Indian tribal government),''; and

(2) by inserting ''landfill gas, incremental hydropower, ocean'' after ''wind, biomass,''.

(c) ELIGIBILITY WINDOW.—Section 1212(c) of the Energy Policy Act of 1992 (42 U.S.C. 13317(c)) is amended by striking ''during the 10-fiscal year period beginning with the first full fiscal year occurring after the enactment of this section'' and inserting ''before October 1, 2013''.

(d) PAYMENT PERIOD.—Section 1212(d) of the Energy Policy Act of 1992 (42 U.S.C. 13317(d)) is amended in the second sentence by inserting ''or in which the Sec-

retary determines that all necessary Federal and State authorizations have been obtained to begin construction of the facility'' after ''eligible for such payments''.

(e) AMOUNT OF PAYMENT.—Section 1212(e)(1) of the Energy Policy Act of 1992 (42 U.S.C. 13317(e)(1)) is amended in the first sentence by inserting ''landfill gas, incremental hydropower, ocean'' after ''wind, biomass,''.

(f) TERMINATION OF AUTHORITY.—Section 1212(f) of the Energy Policy Act of 1992 (42 U.S.C. 13317(f)) is amended by striking ''the expiration of'' and all that follows through ''of this section'' and inserting ''September 30, 2023''.

(g) INCREMENTAL HYDROPOWER; AUTHORIZATION OF APPROPRIATIONS.—Section 1212 of the Energy Policy Act of 1992 (42 U.S.C. 13317) is amended by striking subsection (g) and inserting the following:

''(g) INCREMENTAL HYDROPOWER.—

''(1) DEFINITION OF INCREMENTAL HYDROPOWER.—In this subsection, the term 'incremental hydropower' means additional generating capacity achieved from increased efficiency or an addition of new capacity at a hydroelectric facility in existence on the date of enactment of this paragraph.

''(2) PROGRAMS.—Subject to subsection (h)(2), if an incremental hydropower program meets the re-

quirements of this section, as determined by the Secretary, the incremental hydropower program shall be eligible to receive incentive payments under this section.

''(h) AUTHORIZATION OF APPROPRIATIONS.—

''(1) IN GENERAL.—Subject to paragraph (2), there are authorized to be appropriated such sums as are necessary to carry out this section for each of fiscal years 2003 through 2023.

''(2) LIMITATION ON FUNDS USED FOR INCREMENTAL HYDROPOWER PROGRAMS.—Not more than 30 percent of the amounts made available under paragraph (1) shall be used to carry out programs described in subsection (g)(2).

''(3) AVAILABILITY OF FUNDS.—Funds made available under paragraph (1) shall remain available until expended.''.

TITLE III—ENERGY EFFICIENCY AND ASSISTANCE TO LOW-INCOME CONSUMERS

SEC. 301. LOW-INCOME COMMUNITY ENERGY EFFICIENCY PILOT PROGRAM.

(a) DEFINITION OF INDIAN TRIBE.—

(1) IN GENERAL.—In this section, the term ''Indian tribe'' means any Indian tribe, band, nation,

or other organized group or community that is recognized as being eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(2) INCLUSIONS.—In this section, the term ''Indian tribe'' includes an Alaskan Native village, Regional Corporation, and Village Corporation (as defined in or established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)).

(b) GRANTS TO LOCAL GOVERNMENT, NONPROFIT, AND TRIBAL ENTITIES.—The Secretary may provide grants to units of local government, private, nonprofit community development organizations, and tribal economic development entities for use in—

(1) improving energy efficiency;

(2) identifying and developing alternative renewable and distributed energy supplies; and

(3) increasing energy conservation in low-income rural and urban communities.

(c) COMPETITIVE GRANTS.—In addition to grants described in subsection (b), the Secretary may provide grants on a competitive basis for—

(1) investments that develop alternative renewable and distributed energy supplies;

(2) energy efficiency projects and energy conservation programs;

(3) studies and other activities that improve energy efficiency in low-income rural and urban communities;

(4) planning and development assistance for increasing the energy efficiency of buildings and facilities; and

(5) technical and financial assistance to local government and private entities on developing new renewable and distributed sources of power or combined heat and power generation.

(d) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section $20,000,000 for each of fiscal years 2003 through 2005.

SEC. 302. RURAL AND REMOTE COMMUNITY ELECTRIFICATION GRANTS.

Section 313 of the Rural Electrification Act of 1936 (7 U.S.C. 940c) is amended by adding at the end the following:

''(e) RURAL AND REMOTE COMMUNITIES ELECTRIFICATION GRANTS.—

''(1) DEFINITIONS.—In this subsection:

''(A) ELIGIBLE ENTITY.—The term 'eligible entity' means—

''(i) a unit of local government of a State or Territory;

''(ii) an Indian tribe; and

''(iii) a tribal college or university.

''(B) INDIAN TRIBE.—

''(i) IN GENERAL.—The term 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community that is recognized as being eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

''(ii) INCLUSIONS.—The term ''Indian tribe'' includes a Alaskan Native village, Regional Corporation, and Village Corporation (as defined in or established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)).

''(C) TRIBAL COLLEGE OR UNIVERSITY.—The term 'tribal college or university' has the meaning given the term in section 316(b)(3) of the Higher Education Act (20 U.S.C. 1059c(b)(3))).

''(2) GRANTS.—The Secretary, in consultation with the Secretary of Energy and the Secretary of

the Interior, may provide to an eligible entity 1 or more grants for the purpose of—

''(A) increasing energy efficiency;

''(B) siting or upgrading transmission and distribution lines; or

''(C) providing or modernizing electric facilities.

''(3) GRANT CRITERIA.—The Secretary shall provide grants under this subsection based on a determination of the most effective and cost-efficient use of the funds to achieve the purposes of this subsection.

''(4) PRIORITY.—In providing grants under this subsection, the Secretary shall give priority to renewable energy facilities.

''(5) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this subsection $20,000,000 for each of the 7 fiscal years following the fiscal year in which this subsection is enacted.''.

○

II

108TH CONGRESS
1ST SESSION

S. 522

To amend the Energy Policy Act of 1992 to assist Indian tribes in developing energy resources, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 5, 2003

Mr. CAMPBELL (for himself and Mr. DOMENICI) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

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A BILL

To amend the Energy Policy Act of 1992 to assist Indian tribes in developing energy resources, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Native American Energy Development and Self-Determination Act of 2003''.

SEC. 2. INDIAN ENERGY.

(a) IN GENERAL.—Title XXVI of the Energy Policy Act of 1992 (25 U.S.C. 3501 et seq.) is amended to read as follows:

"TITLE XXVI—INDIAN ENERGY

"SEC. 2601. FINDINGS; PURPOSES.

''(a) FINDINGS.—Congress finds that—

''(1) the energy resources of Indians and Indian tribes are among the most valuable natural resources of Indians and Indian tribes;

''(2) there exists a special legal and political relationship between the United States and Indian tribes as expressed in treaties, the Constitution, Federal statutes, court decisions, executive orders, and course of dealing;

''(3) Indian land comprises approximately 5 percent of the land area of the United States, but contains an estimated 10 percent of all energy reserves in the United States, including—

''(A) 30 percent of known coal deposits located in the western portion of the United States;

''(B) 5 percent of known onshore oil deposits of the United States; and

''(C) 10 percent of known onshore natural gas deposits of the United States;

''(4) coal, oil, natural gas, and other energy minerals produced from Indian land represent more

than 10 percent of total nationwide onshore production of energy minerals;

''(5) in 2000, 9,300,000 barrels of oil, 299,000,000,000 cubic feet of natural gas, and 21,400,000 tons of coal were produced from Indian land, representing $700,000,000 in Indian energy revenue;

''(6) the Department of the Interior estimates that only 25 percent of the oil and less than 20 percent of all natural gas reserves on Indian land have been developed;

''(7) the Department of Energy estimates that the wind resources of the Great Plains could meet 75 percent of the electricity demand in the contiguous 48 States;

''(8) the development of Indian energy resources would assist—

''(A) Indian communities in carrying out community development efforts; and

''(B) the United States in securing a greater degree of independence from foreign sources of energy; and

''(9) the United States, in accordance with Federal Indian self-determination laws and policies,

should assist Indian tribes and individual Indians in developing Indian energy resources.

''(b) PURPOSES.—The purposes of this title are—

''(1) to assist Indian tribes and individual Indians in the development of Indian energy resources; and

''(2) to further the goal of Indian self-determination, particularly through the development of stronger tribal governments and greater degrees of tribal economic self-sufficiency.

''SEC. 2602. DEFINITIONS.

''In this title:

''(1) COMMISSION.—The term 'Commission' means the Indian Energy Resource Commission established by section 2606(a).

''(2) DIRECTOR.—The term 'Director' means the Director of the Office of Indian Energy Policy and Programs.

''(3) INDIAN.—The term 'Indian' means an individual member of an Indian tribe who owns land or an interest in land, the title to which land—

''(A) is held in trust by the United States; or

''(B) is subject to a restriction against alienation imposed by the United States.

''(4) INDIAN LAND.—The term 'Indian land' means—

''(A) any land located within the boundaries of an Indian reservation, pueblo, or rancheria;

''(B) any land not located within the boundaries of an Indian reservation, pueblo, or rancheria, the title to which is held—

''(i) in trust by the United States for the benefit of an Indian tribe;

''(ii) by an Indian tribe, subject to restriction by the United States against alienation; or

''(iii) by a dependent Indian community; and

''(C) land conveyed to a Native Corporation under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.).

''(5) INDIAN RESERVATION.—The term 'Indian reservation' includes—

''(A) an Indian reservation in existence as of the date of enactment of this paragraph;

''(B) a public domain Indian allotment;

''(C) a former reservation in the State of Oklahoma;

''(D) a parcel of land owned by a Native Corporation under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.); and

''(E) a dependent Indian community located within the borders of the United States, regardless of whether the community is located—

''(i) on original or acquired territory of the community; or

''(ii) within or outside the boundaries of any particular State.

''(6) INDIAN TRIBE.—The term 'Indian tribe' has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

''(7) NATIVE CORPORATION.—The term 'Native Corporation' has the meaning given the term in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602).

''(8) PROGRAM.—The term 'Program' means the Indian energy resource development program established under section 2603(a).

''(9) SECRETARY.—The term 'Secretary' means the Secretary of Energy.

''(10) TRIBAL CONSORTIUM.—The term 'tribal consortium' means an organization that consists of at least 3 entities, 1 of which is an Indian tribe.

''(11) VERTICAL INTEGRATION OF ENERGY RESOURCES.—The term 'vertical integration of energy resources' means—

''(A) the discovery and development of renewable and nonrenewable energy resources;

''(B) electricity transmission; and

''(C) any other activity that is carried out to achieve the purposes of this title, as determined by the Secretary.

''SEC. 2603. INDIAN ENERGY RESOURCE DEVELOPMENT PROGRAM.

''(a) IN GENERAL.—The Secretary shall establish and implement an Indian energy resource development program to assist Indian tribes and tribal consortia in achieving the purposes of this title.

''(b) GRANTS AND LOANS.—In carrying out the Program, the Secretary shall, at a minimum—

''(1) provide development grants to Indian tribes and tribal consortia for use in developing or obtaining the managerial and technical capacity needed to develop energy resources on Indian land;

''(2) provide grants to Indian tribes and tribal consortia for use in carrying out projects to promote the vertical integration of energy resources, and to process, use, or develop those energy resources, on Indian land; and

''(3) provide low-interest loans to Indian tribes and tribal consortia for use in the promotion of energy resource development and vertical integration or energy resources on Indian land.

''(c) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section such sums as are necessary for each of fiscal years 2004 through 2014.

''SEC. 2604. INDIAN TRIBAL RESOURCE REGULATION.

''(a) IN GENERAL.—The Secretary may provide to Indian tribes and tribal consortia, on an annual basis, grants for use in developing, administering, implementing, and enforcing tribal laws (including regulations) governing the development and management of energy resources on Indian land.

''(b) USE OF FUNDS.—Funds from a grant provided under this section may be used by an Indian tribe or tribal consortium for—

''(1) the development of a tribal energy resource inventory or tribal energy resource;

''(2) the development of a feasibility study or other report necessary to the development of energy resources;

''(3) the development of tribal laws and technical infrastructure to protect the environment under applicable law; or

''(4) the training of employees that—

''(A) are engaged in the development of energy resources; or

''(B) are responsible for protecting the environment.

''(c) OTHER ASSISTANCE.—To the maximum extent practicable, the Secretary and the Secretary of the Interior shall make available to Indian tribes and tribal consortia scientific and technical data for use in the development and management of energy resources on Indian land.

''SEC. 2605. LEASES, BUSINESS AGREEMENTS, AND RIGHTS-OF-WAY INVOLVING ENERGY DEVELOPMENT OR TRANSMISSION.

''(a) IN GENERAL.—Notwithstanding any other provision of law—

''(1) an Indian or Indian tribe may enter into a lease or business agreement for the purpose of energy development, including a lease or business agreement for—

''(A) exploration for, extraction of, processing of, or other development of energy resources; and

''(B) construction or operation of—

''(i) an electric generation, transmission, or distribution facility located on tribal land; or

''(ii) a facility to process or refine energy resources developed on tribal land; and

''(2) a lease or business agreement described in paragraph (1) shall not require the approval of the Secretary if—

''(A) the lease or business agreement is executed under tribal regulations approved by the Secretary under subsection (e); and

''(B) the term of the lease or business agreement does not exceed 30 years.

''(b) RIGHTS-OF-WAY FOR PIPELINES OR ELECTRIC TRANSMISSION OR DISTRIBUTION LINES.—An Indian tribe may grant a right-of-way over the tribal land of the Indian tribe for a pipeline or an electric transmission or distribution line without specific approval by the Secretary if—

''(1) the right-of-way is executed under and complies with tribal regulations approved by the Secretary under subsection (e);

''(2) the term of the right-of-way does not exceed 30 years; and

''(3) the pipeline or electric transmission or distribution line serves—

''(A) an electric generation, transmission, or distribution facility located on tribal land; or

''(B) a facility located on tribal land that processes or refines renewable or nonrenewable energy resources developed on tribal land.

''(c) RENEWALS.—A lease or business agreement entered into or a right-of-way granted by an Indian tribe under this section may be renewed at the discretion of the Indian tribe in accordance with this section.

''(d) VALIDITY.—No lease, business agreement, or right-of-way under this section shall be valid unless the lease, business agreement, or right-of-way is authorized in accordance with tribal regulations approved by the Secretary under subsection (e).

''(e) TRIBAL REGULATORY REQUIREMENTS.—

''(1) IN GENERAL.—An Indian tribe may submit to the Secretary for approval tribal regulations

governing leases, business agreements, and rights-of-way under this section.

''(2) APPROVAL OR DISAPPROVAL.—

''(A) IN GENERAL.—Not later than 120 days after the date on which the Secretary receives tribal regulations submitted by an Indian tribe under paragraph (1) (or such later date as may be agreed to by the Secretary and the Indian tribe), the Secretary shall approve or disapprove the regulations.

''(B) CONDITIONS FOR APPROVAL.—The Secretary shall approve tribal regulations submitted under paragraph (1) only if the regulations include provisions that, with respect to a lease, business agreement, or right-of-way under this section—

''(i) ensure the acquisition of necessary information from the applicant for the lease, business agreement, or right-of-way;

''(ii) address the term of the lease or business agreement or the term of conveyance of the right-of-way;

''(iii) address amendments and renewals;

"(iv) address consideration for the lease, business agreement, or right-of-way;

"(v) address technical or other relevant requirements;

"(vi) establish requirements for environmental review in accordance with subparagraph (C);

"(vii) ensure compliance with all applicable environmental laws;

"(viii) identify final approval authority;

"(ix) provide for public notification of final approvals; and

"(x) establish a process for consultation with any affected States concerning potential off-reservation impacts associated with the lease, business agreement, or right-of-way.

"(C) ENVIRONMENTAL REVIEW PROCESS.—Tribal regulations submitted under paragraph (1) shall establish, and include provisions to ensure compliance with, an environmental review process that, with respect to a lease, business agreement, or right-of-way under this section, provides for—

''(i) the identification and evaluation of all significant environmental impacts (as compared with a no-action alternative);

''(ii) the identification of proposed mitigation;

''(iii) a process for ensuring that the public is informed of and has an opportunity to comment on any proposed lease, business agreement, or right-of-way before tribal approval of the lease, business agreement, or right-of-way (or any amendment to or renewal of a lease, business agreement, or right-of-way); and

''(iv) sufficient administrative support and technical capability to carry out the environmental review process.

''(3) PUBLIC PARTICIPATION.—The Secretary may provide notice and opportunity for public comment on tribal regulations submitted under paragraph (1).

''(4) DISAPPROVAL.—If the Secretary disapproves tribal regulations submitted by an Indian tribe under paragraph (1), the Secretary shall—

''(A) notify the Indian tribe in writing of the basis for the disapproval;

''(B) identify what changes or other actions are required to address the concerns of the Secretary; and

''(C) provide the Indian tribe with an opportunity to revise and resubmit the regulations.

''(5) EXECUTION OF LEASE OR BUSINESS AGREEMENT OR GRANTING OF RIGHT-OF-WAY.—If an Indian tribe executes a lease or business agreement or grants a right-of-way in accordance with tribal regulations approved under this subsection, the Indian tribe shall provide to the Secretary—

''(A) a copy of the lease, business agreement, or right-of-way document (including all amendments to and renewals of the document); and

''(B) in the case of tribal regulations or a lease, business agreement, or right-of-way that permits payment to be made directly to the Indian tribe, documentation of those payments sufficient to enable the Secretary to discharge the trust responsibility of the United States as appropriate under applicable law.

''(6) LIABILITY.—The United States shall not be liable for any loss or injury sustained by any

party (including an Indian tribe or any member of an Indian tribe) to a lease, business agreement, or right-of-way executed in accordance with tribal regulations approved under this subsection.

''(7) COMPLIANCE REVIEW.—

''(A) IN GENERAL.—After exhaustion of tribal remedies, any person may submit to the Secretary, in a timely manner, a petition to review compliance of an Indian tribe with tribal regulations of the Indian tribe approved under this subsection.

''(B) ACTION BY SECRETARY.—The Secretary shall—

''(i) not later than 60 days after the date on which the Secretary receives a petition under subparagraph (A), review compliance of an Indian tribe described in subparagraph (A); and

''(ii) on completion of the review, if the Secretary determines that an Indian tribe is not in compliance with tribal regulations approved under this subsection, take such action as is necessary to compel compliance, including—

''(I)(aa) rescinding a lease, business agreement, or right-of-way under this section; or

''(bb) suspending a lease, business agreement, or right-of-way under this section until an Indian tribe is in compliance with tribal regulations; and

''(II) rescinding approval of the tribal regulations and reassuming the responsibility for approval of leases, business agreements, or rights-of-way associated with an energy pipeline or distribution line described in subsection (b).

''(C) COMPLIANCE.—If the Secretary seeks to compel compliance of an Indian tribe with tribal regulations under subparagraph (B)(ii), the Secretary shall—

''(i) make a written determination that describes the manner in which the tribal regulations have been violated;

''(ii) provide the Indian tribe with a written notice of the violation together with the written determination; and

''(iii) before taking any action described in subparagraph (B)(ii) or seeking any other remedy, provide the Indian tribe with a hearing and a reasonable opportunity to attain compliance with the tribal regulations.

''(D) APPEAL.—An Indian tribe described in subparagraph (C) shall retain all rights to appeal as provided in regulations promulgated by the Secretary.

''(f) AGREEMENTS.—

''(1) IN GENERAL.—Any agreement by an Indian tribe that relates to the development of an electric generation, transmission, or distribution facility, or a facility to process or refine renewable or nonrenewable energy resources developed on tribal land, shall not require the specific approval of the Secretary under section 2103 of the Revised Statutes (25 U.S.C. 81) if the activity that is the subject of the agreement is carried out in accordance with this section.

''(2) LIABILITY.—The United States shall not be liable for any loss or injury sustained by any person (including an Indian tribe or any member of an Indian tribe) resulting from an action taken in per-

formance of an agreement entered into under this subsection.

''(g) NO EFFECT ON OTHER LAW.—Nothing in this section affects the application of any provision of—

''(1) the Act of May 11, 1938 (commonly known as the 'Indian Mineral Leasing Act of 1938') (25 U.S.C. 396a et seq.);

''(2) the Indian Mineral Development Act of 1982 (25 U.S.C. 2101 et seq.);

''(3) the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.); or

''(4) any Federal environmental law.

''SEC. 2606. INDIAN ENERGY RESOURCE COMMISSION.

''(a) ESTABLISHMENT.—There is established a commission to be known as the 'Indian Energy Resource Commission'.

''(b) MEMBERS.—The Commission shall consist of—

''(1) 8 members appointed by the Secretary of Interior, based on recommendations submitted by Indian tribes with developable energy resources, at least 4 of whom shall be elected tribal leaders;

''(2) 3 members appointed by the Secretary of Interior, based on recommendations submitted by the Governors of States in which are located—

''(A) 1 or more Indian reservations; or

''(B) Indian land with developable energy resources;

''(3) 2 members appointed by the Secretary of Interior from among individuals in the private sector with expertise in tribal and State taxation of energy resources;

''(4) 2 members appointed by the Secretary of Interior from among individuals with expertise in oil and gas royalty management administration, including auditing and accounting;

''(5) 2 members appointed by the Secretary of Interior from among individuals in the private sector with expertise in energy development;

''(6) 1 member appointed by the Secretary of Interior, based on recommendations submitted by national environmental organizations;

''(7) the Secretary of the Interior; and

''(8) the Secretary.

''(c) APPOINTMENTS.—Members of the Commission shall be appointed not later than 120 days after the date of enactment of the Native American Energy Development and Self-Determination Act of 2003.

''(d) VACANCIES.—A vacancy in the Commission—

''(1) shall be filled in the same manner as the original appointment was made; and

''(2) shall not affect the powers of the Commission.

''(e) CHAIRPERSON.—The members of the Commission shall elect a Chairperson from among the members of the Commission.

''(f) QUORUM.—Eleven members of the Commission shall constitute a quorum, but a lesser number may hold hearings and convene meetings.

''(g) ORGANIZATIONAL MEETING.—Not later than 30 days after the date on which at least 11 members have been appointed to the Commission, the Commission shall hold an organizational meeting to establish the rules and procedures of the Commission.

''(h) COMPENSATION OF MEMBERS.—

''(1) NON-FEDERAL EMPLOYEES.—A member of the Commission who is not an officer or employee of the Federal Government shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which the member is engaged in the performance of the duties of the Commission.

''(2) FEDERAL EMPLOYEES.—A member of the Commission who is an officer or employee of the

Federal Government shall serve without compensation in addition to the compensation received for the services of the member as an officer or employee of the Federal Government.

''(i) TRAVEL EXPENSES.—A member of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for an employee of an agency under subchapter I of chapter 57 of title 5, United States Code, while away from the home or regular place of business of the member in the performance of the duties of the Commission.

''(j) STAFF.—

''(1) IN GENERAL.—The Chairperson of the Commission may, without regard to the civil service laws (including regulations), appoint and terminate an executive director and such other additional personnel as are necessary to enable the Commission to perform the duties of the Commission.

''(2) CONFIRMATION OF EXECUTIVE DIRECTOR.—The employment of an executive director shall be subject to confirmation by the Commission.

''(3) COMPENSATION.—

''(A) IN GENERAL.—Except as provided in subparagraph (B), the Chairperson of the Commission may fix the compensation of the execu-

tive director and other personnel without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification of positions and General Schedule pay rates.

''(B) MAXIMUM RATE OF PAY.—The rate of pay for the executive director and other personnel shall not exceed the rate payable for level IV of the Executive Schedule under section 5316 of title 5, United States Code.

''(4) EXPERTS AND CONSULTANTS.—With the approval of the Commission, the executive director may retain and fix the compensation of experts and consultants as the executive director considered necessary to carry out the duties of the Commission.

''(5) DETAIL OF FEDERAL GOVERNMENT EMPLOYEES.—

''(A) IN GENERAL.—An employee of the Federal Government may be detailed to the Commission without reimbursement.

''(B) CIVIL SERVICE STATUS.—The detail of the employee shall be without interruption or loss of civil service status or privilege.

''(k) DUTIES OF COMMISSION.—The Commission shall—

''(1) develop proposals to address dual taxation by Indian tribes and States of the extraction of energy minerals on Indian land;

''(2) make recommendations to improve the management, administration, accounting, and auditing of royalties associated with the production of energy minerals on Indian land;

''(3) develop alternatives for the collection and distribution of royalties associated with the production of energy minerals on Indian land;

''(4) develop proposals for incentives to foster the development of energy resources on Indian land;

''(5) identify barriers or obstacles to the development of energy resources on Indian land, and make recommendations designed to foster the development of energy resources on Indian land, in order to promote economic development;

''(6) develop proposals for the promotion of vertical integration of energy resources on Indian land; and

''(7) develop proposals on taxation incentives to foster the development of energy resources on Indian land, including investment tax credits and enterprise zone credits.

''(l) POWERS OF COMMISSION.—The Commission or, at the direction of the Commission, any subcommittee or member of the Commission, may, for the purpose of carrying out this title—

''(1) hold such hearings, meet and act at such times and places, take such testimony, receive such evidence, and administer such oaths;

''(2) secure directly from any Federal agency such information; and

''(3) require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, documents, tapes, and materials;

as the Commission, subcommittee, or member considers advisable.

''(m) COMMISSION REPORT.—

''(1) IN GENERAL.—Not later than 2 years after the date of enactment of the Native American Energy Development and Self-Determination Act of 2003, the Commission shall submit to the President, the Committee on Resources of the House of Representatives, and the Committee on Indian Affairs and the Committee on Energy and Natural Resources of the Senate, a report that describes the

proposals, recommendations, and alternatives described in subsection (k).

''(2) REVIEW AND COMMENT.—Before submission of the report required under this subsection, the Chairperson of the Commission shall provide to each interested Indian tribe and each State in which is located 1 or more Indian reservations or Indian land with developable energy resources, a draft of the report for review and comment.

''(n) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Commission such sums as are necessary to carry out this section, to remain available until expended.

''(o) TERMINATION.—The Commission shall terminate 30 days after the date of submission of the report under subsection (m)(1).

''SEC. 2607. ENERGY EFFICIENCY AND STRUCTURES ON INDIAN LAND.

''(a) TECHNICAL ASSISTANCE TO NONPROFIT AND COMMUNITY ORGANIZATIONS.—The Secretary of Housing and Urban Development, in cooperation with Indian tribes or tribally-designated housing entities of Indian tribes, shall provide, to eligible (as determined by the Secretary of Housing and Urban Development) nonprofit and com-

munity organizations, technical assistance to initiate and expand the use of energy-saving technologies in—

''(1) new home construction;

''(2) housing rehabilitation; and

''(3) housing in existence as of the date of enactment of the Native American Energy Development and Self-Determination Act of 2003.

''(b) REVIEW.—The Secretary of Housing and Urban Development and the Secretary of the Interior, in consultation with Indian tribes or tribally-designated housing entities of Indian tribes, shall—

''(1) complete a review of regulations promulgated by the Secretary of Housing and Urban Development and the Secretary of the Interior to identify any feasible measures that may be taken to promote greater use of energy efficient technologies in housing for which Federal assistance is provided under the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 et seq.);

''(2) develop energy efficiency and conservation measures for use in connection with housing that is—

''(A) located on Indian land; and

''(B) constructed, repaired, or rehabilitated using assistance provided under any law or program administered by the Secretary of Housing and Urban Development or the Secretary of the Interior, including—

''(i) the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 et seq.); and

''(ii) the Indian Home Improvement Program of the Bureau of Indian Affairs; and

''(3) promote the use of the measures described in paragraph (2) in programs administered by the Secretary of Housing and Urban Development and the Secretary of the Interior, as appropriate.

''SEC. 2608. INDIAN MINERAL DEVELOPMENT REVIEW BY SECRETARY OF THE INTERIOR.

''(a) IN GENERAL.—As soon as practicable after the date of enactment of the Native American Energy Development and Self-Determination Act of 2003, the Secretary of the Interior shall conduct and provide to the Secretary a review of all activities being conducted under the Indian Mineral Development Act of 1982 (25 U.S.C. 2101 et seq.) as of that date.

''(b) REPORT.—Not later than 1 year after the date of enactment of the Native American Energy Development and Self-Determination Act of 2003, the Secretary shall submit to the Committee on Resources and the Committee on Energy and Commerce of the House of Representatives and the Committee on Indian Affairs and the Committee on Energy and Natural Resources of the Senate a report that includes—

''(1) the results of the review;

''(2) recommendations to ensure that Indian tribes have the opportunity to develop Indian energy resources; and

''(3)(A) an analysis of the barriers to the development of energy resources on Indian land (including legal, fiscal, market, and other barriers); and

''(B) recommendations for the removal of those barriers.

''SEC. 2609. INDIAN ENERGY STUDY BY SECRETARY OF ENERGY.

''(a) IN GENERAL.—Not later than 2 years after the date of enactment of the Native American Energy Development and Self-Determination Act of 2003, and every 2 years thereafter, the Secretary shall submit to the Committees on Energy and Commerce and Resources of the House of Representatives and the Committee on Energy

and Natural Resources and the Committee on Indian Affairs of the Senate a report on energy development potential on Indian land.

''(b) REQUIREMENTS.—The report shall—

''(1) identify barriers to the development of renewable energy by Indian tribes (including legal, regulatory, fiscal, and market barriers); and

''(2) include recommendations for the removal of those barriers.

''SEC. 2610. CONSULTATION WITH INDIAN TRIBES.

''In carrying out this title, the Secretary and the Secretary of Interior shall, as appropriate and to the maximum extent practicable, involve and consult with Indian tribes in a manner that is consistent with the Federal trust and the government-to-government relationships between Indian tribes and the Federal Government.''.

(b) ENERGY EFFICIENCY IN FEDERALLY-ASSISTED HOUSING.—

(1) FINDING.—Congress finds that the Secretary of Housing and Urban Development should promote energy conservation in housing that is located on Indian land and assisted with Federal resources through—

(A) the use of energy-efficient technologies and innovations (including the procurement of

energy-efficient refrigerators and other appliances);

(B) the promotion of shared savings contracts; and

(C) the use and implementation of such other similar technologies and innovations as the Secretary of Housing and Urban Development considers to be appropriate.

(2) AMENDMENT.—Section 202(2) of the Native American Housing and Self-Determination Act of 1996 (25 U.S.C. 4132(2)) is amended by inserting ''improvement to achieve greater energy efficiency,'' after ''planning,''.

○

The CHAIRMAN. I will put my full statement in the record because we do have a vote at 3 o'clock. What we will probably have to do is try to get through the first panel, take a break and then come back for the second panel.

With that, I would like to turn to our Vice Chairman, Senator Inouye.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator INOUYE. Thank you very much, Mr. Chairman, for scheduling this hearing, because these initiatives are very important and intended to provide support to tribal governments in the development of energy resources on Indian lands, and to provide incentives for partnership with tribes that want to develop their resources. With the vast untapped resources on tribal lands throughout the United States, it is clear that Indian country has an important contribution to make to our Nation's energy reserves.

I am pleased that our colleague from New Mexico, and the author of one of the measures we consider today, Senator Bingaman, will be with us a little later in the hearing to address this bill. I thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you. Senator Bingaman might wait until after the vote to be here to introduce his bill.

We will go ahead and start with Panel I. Theresa Rosier, counselor to the Assistant Secretary for Indian Affairs, Department of the Interior, and Vicky Bailey, Assistant Secretary for Policy and International Affairs, Department of Energy, please come forward.

Theresa, if you would like to start, go ahead.

STATEMENT OF THERESA ROSIER, COUNSELOR TO THE ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Ms. ROSIER. Good afternoon, Mr. Chairman, Vice Chairman, and members of the committee. My name is Theresa Rosier, and I am counselor to the Assistant Secretary for Indian Affairs.

I am pleased today to present the Department of the Interior's views on S. 522, the Native American Energy Development and Self-Determination Act of 2003, and S. 424, the Tribal Energy Self-Sufficiency Act.

I will abbreviate my testimony and submit my complete written testimony for the record.

The CHAIRMAN. Without objection, that will be fine.

[Prepared statement of Ms. Rosier appears in appendix.]

Ms. ROSIER. The Bureau of Indian Affairs manages approximately 56 million acres of land in trust for individual Indians and Indian tribes. Currently there are 1.81 million acres of actively leased oil, gas, and coal in various phases of exploration and development. In fact, production of energy minerals from Indian tribes continues to represent over 10 percent of the total Federal onshore production.

Moreover, production from Indian lands in the year 2001 was 13.1 billion barrels of oil, 280 billion cubic feet of gas, and 29.4 million short tons of coal. It is estimated that an additional 15 million acres of undeveloped energy resources exists on individual and trib-

al land. The potential for further energy development in Indian country is exciting.

Increased energy development in Indian country means increased jobs. In many Indian and Alaska Native communities, joblessness and underemployment are painfully acute. More than ever, tribes need the job and training opportunities that go hand-in-hand with expanded mineral and energy development.

One of the tragic ironies of life in Indian communities is that tribes often possess substantial energy resources but yet they often pay very high, or the highest electrical costs, and sometimes lack complete access to electricity. As the Navajo tribe will testify to later today, over 37 percent of their tribe does not have access to electricity.

Consistent with the President's National Energy Policy to secure America's energy future, increased energy development in Indian and Alaska native communities will help the Nation increase its domestic energy resources. S. 522 promotes increased and efficient energy development and production in an environmentally sound manner.

While the administration supports the goals and objectives of S. 522, which are the promotion of self-determination and economic development, there are there several provisions which we want to work with the committee on before this bill moves forward.

Because this legislation has programs that affect both the Department of the Interior, the Department of Energy, and the Department of Housing and Urban Development, my testimony today will only focus on the Department of the Interior and how the bill relates to them.

S. 522 bills upon the self-determination principles of the Indian Mineral Development Act of 1982. It focuses on tribal control and tribal flexibility for the exploration, extraction, processing, and development of fossil and renewable resources. S. 522 would authorize individual Indians and tribal governments to enter into energy development leases or business agreements without Federal review, as long as two certain preconditions have been met.

One, that the Secretary has already approved the tribal regulations which govern these leases and business agreements, and two, that these leases and business agreements do not exceed 30 years.

Moreover, this bill authorizes tribes to grant rights-of-way over tribal land for electrical, pipeline, and distribution lines. There must be three conditions before these rights-of-way could be granted.

First, that the Secretary has approved the regulations which govern the rights-of-way; second, that the rights-of-way does not exceed 30 years, and third, that the pipeline, transmission, or distribution lines serve either a facility located on Indian land or energy that was produced on Indian land. The Department supports increased tribal regulation and expedited review of these regulatory processes.

As drafted, however, it is unclear whether this section would apply to the Department of the Interior or the Department of Energy. The Department believes that it is most appropriate for the Secretary of the Interior to approve tribal regulations which govern the leasing of trust or restricted land, conveyances of rights-of-way,

and business agreements because documentations necessary to prove such tribal regulations involve trust records and trust payments and are under the purview of the Department of the Interior.

Generally the Department is supportive of the creation of the Indian Energy Resource Commission. We look to the Commission to recommend ways to facilitate economic development and Indian and Alaska Native communities. Hopefully this will mean that there will be more tribal joint ventures, greater tribal participation in the building of transmission and distribution lines, and increased tribal ownership of power plant and utility companies.

The Department, however, is opposed to the power of the Commission to subpoena testimony and records. This Commission should not be an investigatory body. Instead, we look to this Commission to look to future goals for Indian economic development. As we understand it, the General Accounting Office does not have the authority to subpoena records from Federal Government agencies.

Now I will discuss S. 424, the Tribal Energy Self-Sufficiency Act. Both renewable and nonrenewable energy is uniquely positioned to play a critical role as the Nation starts to look at domestic energy supplies. In addition to traditional energy resources, alternative and renewable energies play a critical part in the President's energy policy.

My testimony today will focus on the provisions of S. 424 which deal directly with the Department of the Interior. S. 424 would also increase tribal self-determination. It would authorize Indian tribes to lease land for electrical generation, transmission, or distribution, and for facilities to refine renewable and non-renewable energy sources. There are two preconditions that must be met here.

First, that the lease was approved by regulations which the Secretary of the Interior approved and, second, that the lease did not exceed 30 years. Moreover, tribes are also authorized to grant a right-of-way over tribal lands without the Secretary of the Interior approval if the rights-of-way was executed with regulations pre-approved by the Secretary, the rights-of-way does not exceed 30 years, and that the transmission or distribution facilities serve as a facility on Indian lands, or that the energy was produced on Indian lands.

Also, S. 424 authorizes the approval of energy business agreements without Secretarial review if a comprehensive environmental review process has already been completed. These provisions promote increased tribal self-determination as tribes administer and regulate their own tribal energy policy.

Moreover, efficient locally-controlled regulatory structures and Indian communities create a business-friendly environment that promotes exciting partnerships between the tribes, the private sector, and the Federal Government.

Second, the bill also requires review of the Indian Mineral Development Act. It has been over 20 years since IMDA was enacted. The Department is already working with tribes to review IMDA and to improve energy development in Indian country.

For example, in November or December 2001, the Department held an Indian Energy Summit. From this Summit, we have had six scoping meetings around the country this past year from April

2002 until December 2002. The Department talked with tribes and started pre-consultations an a National Indian Energy Policy. What the Department is looking to do next is to establish formal consultations with the tribes to work on an National Indian Energy Policy.

Thank you for the opportunity to testify before you. I welcome any questions.

The CHAIRMAN. Thank you.

Ms. Bailey.

STATEMENT OF VICKY BAILEY, ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS, DEPARTMENT OF ENERGY, WASHINGTON, DC

Ms. BAILEY. Thank you, Mr. Chairman, Mr. Vice Chairman, and members of the committee. I, too, am pleased to be here to discuss proposed legislation, S. 424, and S. 522, regarding the Indian Energy Policy and to provide you information on the Department's current structure and ongoing programs.

Our activities reflect Secretary Abraham's affirmation of the Department's commitment to meet its responsibilities to Indian country in a manner consistent with the government-to-government relationship that exists between federally-recognized tribes and the Department.

Before I begin my formal testimony, I would like to commend you, Mr. Chairman, and the entire committee on your leadership in addressing the challenging issues before us. We all know that the United States is better served when the Federal Government and Indian tribes work together to meet common objectives.

From an energy perspective, Native American reservations contain large reserves of oil and gas. There are an estimated 890 million barrels of oil and natural gas liquids, and 5.5 trillion cubic feet of gas on tribal lands. This translates into huge potential revenues for the tribes even when conservative production estimates are used.

Indian energy resource development and energy policy, in general, are areas where the Department and the Indian tribes share many mutual interests and can together influence America's future in a constructive manner.

As Secretary Abraham has stated, the Administration wants to work with Congress on provisions that facilitate energy development on tribal lands while enhancing and protecting the environment.

The Administration's commitment to a comprehensive and balanced national energy policy is in the best interest of all Americans. That is why the President announced his National Energy Policy in May 2001, less than 4 months after he took office. We face many energy challenges that require attention now. Enacting an effective National Energy Policy during the 108th Congress is one of the President's top priorities. We are pleased that both houses of Congress are moving forward.

As you know, today a key House subcommittee is marking up comprehensive energy legislation. The short and long-term energy supply and demand issues are before us, in addition to posing chal-

lenges, providing an opportunity for us to improve our environment and our economy, while enhancing our energy future.

Americans share many common concerns regarding that energy future. Those shared concerns may not offer one-size-fits-all solutions. Some issues will require different approaches that recognize the unique dynamics at play due to any number of factors and circumstances. Certainly there are issues unique to Indian country, and we must have the tools to address them within our National Energy Policy framework.

I would like to provide an overview of the Department's energy structure in order to provide a reference point for the proposed legislation in implementing Secretary Abraham's written direction to department heads requesting that they honor the government-to-government relationship that exists between the Federal Government and federally-recognized Indian tribes. Tribal points of contact have been established. These 50 points of contact focus on relations with Native American tribes and Alaska Natives.

In addition, within DOE's Office of Congressional and Intergovernmental Affairs, a Director of Indian Affairs serves as the Department's primary point-of-contact on Native American issues. A recent vacancy in that position should be filled in the very near future, but the work of that office and that director continues to be performed through our Office of Intergovernmental and External Affairs.

To give some examples of DOE's tribal activity within selected programs at DOE sites, DOE and our power marketing administrations are committed to continuing our work with tribal governments on the many issues in which we have a common interest.

Mr. Chairman, in the interest of time I will not list those representative activities in my oral statement. They are included in my formal testimony, and include programs and projects within the following three DOE offices: The Office of Economic Impact and Diversity, the Office of Energy Efficiency and Renewable Energy, and Western Area Power Administration, commonly known as WAPA.

Regarding the legislation pending before the committee, the Department is reviewing the provisions of S. 424 and S. 522. These two bills are comprehensive and we support the goal of maximizing environmentally sound resource development on tribal lands. We will continue to study the specific provisions of the legislation and look forward to working with you toward achievement of our mutual objectives.

This concludes my oral statement, Mr. Chairman. I hope that my testimony provides you and the other members of the committee with a good understanding of the importance this Administration attaches to our work with American Indian tribes and Alaska Natives in the context of the President's National Energy Policy.

I will be pleased to respond to any questions you may have and ask that my written testimony be placed in the record in its entirety.

[Prepared statement of Ms. Bailey appears in appendix.]

The CHAIRMAN. Thank you.

Just listening to the both of you, I have to tell you, it sounds like the Energy Department is going to be a lot more supportive of Indian programs that the Interior Department. One of the big prob-

lems that we hear from tribes is that Interior either doesn't approve the documents that the tribes need or the Department scuttles the deal, or the Department was so slow in doing it that the tribes or its business partner loses interest.

After hearing your comments, Ms. Rosier, I think I should have kept you on staff here and not let you go over there to Interior. [Laughter.]

I'll pass on that for 1 minute and ask you some questions.

Senator Bingaman, did you want to talk about your bill for a moment?

STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO

Senator BINGAMAN. Thank you very much, Mr. Chairman, for inviting me here. I do appreciate the chance to say a few words about S. 424, that I introduced with your support, Senator Inouye's support, and Senator Daschle's support as well.

This essentially is the title that we included in the comprehensive energy bill that we passed through the Senate last year. We put a title in there related to development of energy resources on Indian lands. We have taken those provisions and included them here.

We think they are important that as we develop this comprehensive energy policy in ensuring that there be sufficient emphasis on the opportunity that we have, not only to develop resources that are on Indian American lands, but also to be sure that the benefits of those resources accrue to the Indian community.

We have a terrible problem in my State and in various States around the country. Although some of our reservations are rich in energy resources, we have many people living on those reservations who, for example, have no electricity. We need to help both in the development of the resources and help to ensure that the benefits of that development inures to the actual tribal members.

That is one of the things we are trying to do in S. 424. We do call for setting up in that legislation an Office of Indian Energy Policy and Programs within the Department of Energy. We expand DOE's authority to assist tribes to help ensure that the Federal Government, as a whole, is working with tribes in a way that is consistent with the Federal Trust responsibility.

We do have additional help there. There are provisions in the bill intended to help facilitate the citing of certain energy projects on Indian land consistent with the sovereign authority of the tribes. We have a lot of other provisions.

There is one area that has become a little controversial that I will just call to the attention of the committee so you can perhaps address it before you pass on this legislation. There are concerns with language in the bill that limits the liability of the Federal Government with respect to leases and rights-of-way approved by tribes under the citing provisions of the bill.

We are glad to work with you, Mr. Chairman, to be sure that those concerns are addressed. We think there is a way to do that. I encourage the committee to look closely at that issue before you finally pass on the bill. That is something that should be corrected at the committee and there is no reason that we cannot do that.

I think that sums up the points I had to make on the legislation. I look forward to working with you not only on this bill but on your companion bill, S. 522. I hope that your committee here can move ahead and we can move ahead in the Energy Committee as well and see to it that it gets to the President's desk.

The CHAIRMAN. Thank you.

Senator Thomas, as a cosponsor of S. 522 do you have any comments on either bill?

STATEM,ENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM WYOMING

Senator THOMAS. Thank you, Mr. Chairman. I am sorry that I was not able to be here earlier. I do thank you for having this hearing. I particularly wanted to be here because Chairman Vernon Hill from the Eastern Shoshone Business Council is here. I want to welcome him.

I am on the Energy Committee, as you are, and certainly as we develop a comprehensive energy bill, the resources should not be overlooked in the Indian lands. I think it is something we really ought to do in Wyoming where we have large reservations—over 2 million acres. The opportunity is there for both our tribes to get some economic benefit, as well as benefit to the whole country.

I was a cosponsor of your bill, Senator Campbell, and certainly support what you were seeking to do there. Quite a few of members of this Committee are also on the Energy Committee. We ought to be able to put something together and do it very soon. I look forward to working with all of you.

I would ask that my full statement be inserted in the record.

[prepared statement of Senator Thomas appears in appendix.]

The CHAIRMAN. Thank you. Maybe before we are called to vote, we can ask a few questions.

Theresa, ever since the Nixon days there has been a clear trend in Indian country and Indian policy favoring tribes and letting them exercise more authority themselves and more control over their own programs. But as I hear your statement, it sounds to me that Interior is very concerned over their own ability to keep control over what the tribe does with their energy.

Can you tell me if the Department is really interested in making sure that the Indians move forward with their own extraction process and exploration and the things I think they ought to be able to do?

Ms. ROSIER. Absolutely. The Department of the Interior strongly supports your bill, S. 522. We are supportive of having tribes have more self-determination and have more responsibility in the development of renewable and nonrenewable energies on their lands. We are strongly supportive of that provision.

We would like to comment and work with you just to refine the language, but we are supportive of improvement self-determination.

The CHAIRMAN. Do you have any specific examples of how we can encourage the Department to provide scientific geologic and technical expertise, but at the same time being able to allow the tribes to have more latitude?

Ms. ROSIER. In this year's fiscal year 2004 budget, President Bush asked for a $2-million increase in the grants program that our Division of Energy and Mineral Resources runs. What these grant programs do is they award to tribes grants which the tribes use to explore their energy potential—generally it's mineral. That is part of our budget request. But the Department wants to support tribes to explore their energy resources and renewable and non-renewable resources.

The CHAIRMAN. The Indian Energy Commission would look at ways to remedy issues like dual taxation. If we retain that Commission, what commitments are there that the Department would seek funding for it and make it a priority?

Ms. ROSIER. If this bill is enacted, the Department would work with this Committee to support and help fund this Commission.

The CHAIRMAN. Okay. Good.

Ms. Bailey, we didn't get your comments until about 2½ hours ago. Neither the staff nor I had time to read them so I don't have any specific questions. I think you missed an opportunity to be able to answer some of those. What we are going to do is to put them in writing to you. If you could give those answers back for the full committee, I would appreciate it.

Ms. BAILEY. Most certainly. I would be pleased to do so.

The CHAIRMAN. Senator Inouye.

Senator INOUYE. Thank you.

In both bills, the tribes have the authority to execute and approve their own leases, rights-of-way and agreements with others. If they adopt their own environmental regulations, the National Environmental Policy Act review does not apply; is that correct?

Ms. ROSIER. NEPA would apply when the Secretary is approving the initial regulations. Whether it is a general NEPA review or specific NEPA review depends on what the regulations say. But you are right. After the initial approval of the Secretary, whatever is in the purview of that plan, NEPA would not apply.

Senator INOUYE. However, when that happens, in both bills the Government of the United States will disclaim all liability; is that correct?

Ms. ROSIER. In both bills the language does say that any business agreement or lease that is conveyed under these tribal regulations, that the Government would not have liability for damages; yes.

Senator INOUYE. In your opinion, or the opinion of your Department, would these provisions have any impact upon what we call the trust relationship between Indian country and the Government of the United States?

Ms. ROSIER. The Government would have a trust responsibility and the Secretary would approve these leases and rights-of-way in the initial review of the tribal regulations. After that, it would follow the recent Supreme Court Case, *United States* v. *Navajo.* There is a limited trust responsibility as defined by the language in the bills.

Senator INOUYE. It would permit the Government of the United States to wash its hands and say, "It's none of our business;" is that correct?

Ms. ROSIER. In the vein of tribal self-determination as the Supreme Court ruled in Navajo, if there is not a specific duty of management or obligation, then the Government is not liable for damages.

Senator INOUYE. Is that desirable to the Government of the United States?

Ms. ROSIER. The Government supports the language in these bills. The Department of the Interior supports the language in these bills.

Senator INOUYE. What is the position of the Department of Energy? You mentioned the government-to-government relationship.

Ms. BAILEY. Very committed to government-to-government relationships. We have various projects going on at different sites. They are very site specific. But our analysis as it relates to S. 424 and S. 522 and some of the provisions you are speaking to, we really haven't had the opportunity to get an opinion. We are continuing to look at that and trying to come together on what our thoughts and responses are. But we haven't had an opportunity to get a Department opinion as yet.

Senator INOUYE. As both of you are aware, many years ago private enterprise began constructing hydroelectric dams in Indian Country and have been operating them for about 50 years. They have 50-year leases. They are coming up for re-licensing. They impact upon tribal lands and on tribal cultural resources.

If the tribes are going to participate in their re-licensing, I have been told that the cost may be prohibitive. Is the Government of the United States and the Department of the Interior available to assist and participate in these proceedings, such as providing funding to the tribes to participate in the Federal Energy Regulatory Commission [FERC] re-licensing process?

Ms. ROSIER. Off the top of my head, I don't know our numbers for the FERC program this year and what or budget numbers are. We do work with the tribes rather closely when issuing mandatory conditions. I can follow up in a written answer to you.

Senator INOUYE. I am not an expert. I ask this question because I have been told that many of these licenses were acquired at a time when Indian country was at a disadvantage. The Indians were told, "You take it or else. You like it or don't like it. It makes no difference to us."

Now if they wish to play a significant role in the management of these dams, it is going to cost a whole lot of money which they do not have. Would you check to see if Interior is ready to help the Indians?

Ms. ROSIER. I will.

Senator INOUYE. Mr. Chairman, I have several more questions, but if I may, I would like to submit them.

The CHAIRMAN. Without objection.

Let me ask just one follow-up question since Senator Inouye has touched this subject about managerial control and liability.

If the tribe has managerial control over its resources and it makes the decisions, shouldn't the tribe and not the United States retain the liability over those decisions, too?

Ms. ROSIER. Yes; the Department of the Interior would. It is similar to the language of these bills. We would support those tenents.

The CHAIRMAN. Okay.

Senator Thomas, did you have some questions?

Senator THOMAS. Just one, and it is pretty basic. As we look at ways to change things, to make them work better, what would you say have been the major obstacles as to why there hasn't been more energy development on the tribal lands?

Ms. BAILEY. I will try that first. I think DOE's involvement has been ongoing. I think there have been many ongoing activities. As I have had a chance to prepare my testimony and look at our different offices and the projects in which they are involved, there have been a lot of technology-related and probably environmental-related work with the tribes.

But as it relates to energy, probably the one I know the best is probably the hydroelectric from the standpoint of being a former Commissioner at FERC and from the issue of re-licensing of dams and working with the tribes in that respect. I know that FERC is trying to streamline that process. They recently issued a proposed rule that would make some administrative changes. I believe Congress is also considering legislative reforms.

But probably a lot of it has to do with coming up with a comprehensive plan and obviously funding, making sure that the resources are there as well.

Senator THOMAS. You know, the developers provide the money in energy development. Why can't that be the case here?

Ms. BAILEY. I'm not saying that it probably couldn't be. I have very limited expertise.

Senator THOMAS. It is a puzzle to me. There are obviously opportunities on the tribal lands. Yet years have gone by and not much has happened. As you prepare to fix it, you have to define what you think the major obstacles have been.

Ms. ROSIER. For the Department of the Interior, one of obstacles, as you all aware of being on this committee, is that we are very slow and we are very bureaucratic. I think we have a cumbersome and time consuming process. S. 522 would expedite the regulatory process.

Senator THOMAS. Thank you.

The CHAIRMAN. Okay. We appreciate your being here. There may be further questions from other people on the committee that might be submitted in writing to you both. If you could get those back to us, we would appreciate it. Thank you.

We will now proceed with the second panel as far as we can go until we are called to vote.

Our second panel will be: Joe Shirley, Jr., president of the Navajo Nation; Vernon Hill, chairman of the Eastern Shoshone Business Council; and Robert Santistevan, director, Southern Ute Growth Fund from Ignacio, CO, my home town.

Your complete written testimony will be included in the record if you want to divert from that.

We will start in that order with Mr. Shirley.

STATEMENT OF ARVIN TRUJILLO, DIRECTOR OF NAVAJO NATURAL RESOURCES

Mr. TRUJILLO. Thank you, Mr. Chairman, and members of the Senate Indian Affairs Committee. My name is Arvin Trujillo. I am the executive director for the Division of Natural Resources. I am here representing President Joe Shirley from the Navajo Nation. I would like to extend my greetings to the chairman and members of the committee from the president and vice president of the Navajo Nation.

Again, I want to thank the committee for the opportunity to make the presentation before the committee as well as the work that has been done on S. 424 and S. 522. As noted, we have submitted our testimony.

[Prepared statement of Mr. Shirley appears in appendix.]

Mr. TRUJILLO. What I want to basically focus on, Mr. Chairman, is the purpose of our meeting here today. The Navajo Nation has long been involved in energy development. Since 1921, the Nation has been involved in the development of its resources, starting with oil. In the 1940's and 1950's, we extended that toward the development of uranium. In the 1950's and 1970's, we again further our developed our oil. In the 1960's and 1970's we expanded that into coal.

There are a number of stakeholders involved in the work that we do in terms of the development of our energy. The written testimony begins to look at three basic factors that we are beginning to focus on. No. 1, who benefits from this number? No. 2, who controls the effort? No. 3, who is accountable?

Again, there are a number of stakeholders involved. The Navajo Nation itself, the size of the nation, and the fact that yes, we do have a number of different resources—and I named a few. In essence, we also are very much involved in lighting up the southwestern portion of the United States as well as Southern California. There are tribal members involved. We are beginning to see the impacts on the communities as resources are developed.

We are also looking at the tribal membership in terms of the government as a whole. There are investors involved—the private sector—and how we begin to interact with those investors. The Federal Government itself is involved because of the agencies that are included. That has been noted in the bills that have been developed.

I guess the bottomline is basically looking at the stakeholders. They are seeking a safe and stable environment in which to live and to do business. For the Navajo people, this simply means clean air, water, the ability to continue traditional practices, and the opportunity to improve their quality of life.

For the private sector this is looking at clear rules of finality to help them in their business aspects so that they can better define how to develop their business practices. For the Navajo Government, it means clearly to define a regulatory landscape or environment. For the taxpayers themselves, this means the advancement of the general welfare in the investment in tribes and to get a return—in this case—of energy.

With that in mind, there is a new paradigm, Mr. Chairman and members of the committee, that is beginning to develop. That is

what the Navajo Nation has been focused on for these past 2 years. The paradigm has switched for us as of March 4 of this year.

The goal is to create a return on the public investment to advance tribal self-determination and self-sufficiency and to wean American off foreign oil. Then the Navajo Nation is a major player who has the experience to form a basis of comment because of our experience, because of our location, and because of our size.

We are beginning to learn new aspects on how we can begin to develop our natural resources not only for the benefit of our people and our own government, but also for the benefit of the regional area, as well as the southwestern portion of the United States.

Why I come before this committee and to you, Mr. Chairman, is to look at some basic principles, fundamental principles, that tribes are different. We can't fit all tribes in one box. There is a continuum that we have to begin to address. There needs to be a sliding scale. That sliding scale must recognize a tribe's ability to be self-determinant in certain areas.

How much control does the government have with the tribe? How effective and how efficient are we as tribes in developing our own energy, looking at our own regulatory aspects, and in addressing our own environmental concerns? That sliding scale changes as you look at the different types of development within Indian country.

The second piece is looking at the recent decision by the Supreme Court and begin to address trust responsibilities and how to define this in terms that support self-determination. In the opinion of the Supreme Court there is one statement in there that states: "The ideal of Indian self-determination is directly at odds with Secretarial control."

We are beginning to see a new philosophy beginning to emerge. The honorable Senator from Hawaii has touched on the issue of liability. Again, we are looking on how does that liability touch our abilities to enhance our efforts to advance energy development within our own tribes.

With that new paradigm the Nation begins to again focus on the Supreme Court hearing on March 4, the decision that came down. That has changed. The members of your staff have been given copies of this.

The Navajo Nation is moving forward with an effort toward developing an energy policy for itself. We have done a tremendous amount of research into the area. It has changed a lot of our ideas and assumptions. Our Navajo Nation Council at this point is beginning to address this new paradigm. How do we begin to look at energy development? We have not looked at it from a pragmatic point of view, but bringing it all together.

The Navajo Nation is reanalyzing things that were develop as recently as last year. We support the efforts of the Senators—both yourself, Mr. Chairman, and Senator Bingaman. We support the efforts that were developed in S. 424 and S. 522. But we have to reanalyze those bills in view of the decision that was given down with the Supreme Court.

In closing, Senator Craig Thomas asked about development. I used the analogy of the triangle, saying that you have to have three pieces if you are going to develop anywhere. You have to

have land. You have to have water. And you have to have power. If you miss any of those aspects, development will not happen.

The way I explain it to my own constituents at the Chapter House is that it is like fire. You have to have heat. You have to have a fuel source. You have to have an ignition point, or oxygen. If you take any one of those pieces out, you won't have fire. That is where we stand at this point.

Respectfully, members of the committee, that is what we are working on at this point from the Navajo Nation. We would like to request that we submit further detailed testimony relevant to each of the bills in lieu of the decision that has been said. The president of the Navajo Nation, as well as the council, are looking very closely at these issues. We would like to bring back a position of the nation that is consistent with the decisions that have been made and with some of the new directions that we are beginning we move as the Navajo Nation.

Thank you, Mr. Chairman.

The CHAIRMAN. That is our second bell to vote. With that, we are going to take a 15-minute recess.

[Recess.]

The CHAIRMAN. The committee will come to order.

Senator Inouye has been detained and won't be back. We will go ahead and continue with Vernon Hill.

STATEMENT OF VERNON HILL, CHAIRMAN, EASTERN SHOSHONE BUSINESS COUNCIL, FORT WASHAKIE, WY

Mr. HILL. Good afternoon, Mr. Chairman, and members of the committee. My name is Vernon Hill. I am the chairman of the Eastern Shoshone Business Council in Wyoming. I would like to thank you for the invitation to be here.

My remarks and written statement are submitted on behalf of both the Eastern Shoshone Tribe and the Northern Arapaho Tribe. I would request that they be submitted into the record.

The CHAIRMAN. Without objection, it will be in the record.

[Prepared statement of Mr. Hill appears in appendix.]

Mr. HILL. We generate nearly $180 million annually in economic activity, primarily from oil and gas production. We provide 1,600 jobs, revenue from our oil and gas operations; 85 percent of the royalty income is paid out to tribal members. This provides food, heat, electricity, and other basic needs. For some tribal members, this is their only income.

We have 850 producing wells. Our oil production totals over 20 percent of all royalties paid from Indian reservations in the lower 48 States. Our natural gas totals nearly 10 percent of royalties paid based on known data. We have significantly more untapped reserves.

An ongoing obstacle is the State of Wyoming's 14 percent taxation on the production. These taxes on top of the tribe's 8 percent creates a severe tax burden of 22 percent and is primarily a disincentive for additional development. Therefore, we strongly urge Congress to address the double taxation problem.

In the 107th Congress we supported S. 1106 introduced by Senator Domenici to establish a Federal tax credit based on the volume of production of oil and gas from Indian lands. This type of credit

would stimulate tribal economies and increase the overall domestic oil and gas supplies, thereby reducing our country's dependence on foreign sources of energy.

We believe that any comprehensive energy legislation must include meaningful tax incentives to encourage, promote, and foster energy production on Indian lands. In addition, both our tribes own fee lands and have energy potential. Therefore, we believe these bills should provide some preference or direction to the Secretary of the Interior in processing and approving fee to trust applications for energy development purposes.

With respect to the provisions of S. 424 and S. 522, we offer the following comments. We support creating a comprehensive Indian Energy and Policy Program in the Department of Energy. This program, with appropriate funding, will have a positive impact on energy development in Indian country.

We support S. 424's approach establishing criteria for awarding funding to tribes. We have concern with a factor which involves assessing tribes' financial assets. We believe that the income from natural resources not be weighed against the tribe, especially in cases where the tribe depends on the income from natural resources for over 50 percent of its government operations. We recommend that this provision either be revised or excluded.

We support S. 424's assignment to priority in awarding grants for inadequate electric service that can be demonstrated. We suggest, however, that this factor be clarified to reflect the housing demand and the lack of affordable energy to serve this need. Moreover, due to the specific concerns regarding the location of our tribes on a single indian reservation, our tribes recommend changes in the bill to reflect this circumstance.

On our reservation there is a large, unmet housing need. However, the primary barrier for our members to face in building new homes is the cost of the delivery of electricity. We recommend that the loan guarantee amount in S. 424 be increased from $2 million to $5 million due to the enormous need for capital in Indian Country. We support S. 522's provisions that recognize and strengthen the enforcement of tribal laws.

We believe the provision of benefit of wind energy production on the Wind River Reservation would be streamlined. For oil and gas leasing activities, we are not prepared to undertake this approach.

We are concerned with the cost and liability associated with the streamlining approach. As a policy matter, we are concerned about releasing the Federal Government from the responsibilities over energy resource development.

The current Federal regulatory regime for oil and gas leasing places the responsibilities on the BIA, BLM, and MMS. Until we gain a better understanding of the streamlining process and its impact on oil and gas leasing, we are not prepared to release these Federal agencies from their responsibilities. Perhaps the pilot project to examine the impact on oil and gas leasing would be advisable as a way to assess this more fully.

Our written testimony includes comments on the specific streamlining requirements of both bills as well as comments on other provisions.

This concludes my statement. I would be happy to answer any questions. Thank you.

The CHAIRMAN. Thank you.

We will go on with Sam Maynes for the Southern Ute Growth Fund.

STATEMENT OF FRANK E. MAYNES, TRIBAL ATTORNEY FOR THE SOUTHERN UTE INDIAN TRIBAL CHAIRMAN, HOWARD D. RICHARDS, SR., DURANGO, CO

Mr. MAYNES. Thank you, Mr. Chairman.

The good news is that we are getting a lot of needed moisture in Colorado. The bad news is that the chairman of the Southern Ute Indian Tribe couldn't make it out of Denver to be here. So he asked me to speak to the committee.

The CHAIRMAN. The last part of that bad news is that you probably won't get home with 4 feet of snow in Denver. [Laughter.]

Mr. MAYNES. I was going to speak for some time about the success story of the Southern Ute Indian Tribe with which you are well aware. The Southern Ute Indian Tribe has developed its natural resources over the last 20 years within the system that we have. However, we have analyzed for the Southern Ute Indian Tribe, S. 424 and S. 522. We have submitted a written statement to the committee that summarizes and compares the proposed legislation. We make several suggested changes which we feel are needed to improve the proposals.

No. 1. S. 522 provisions that address loans and rights-of-way are much broader in scope than S. 424. Therefore, we believe that those types of provisions in S. 522 would be a greater help to the tribes. However, there is one provision in S. 424 that we would suggest be included in any legislation and that would be the Indian Preference Provisions in that legislation.

No. 2. The leasing and rights-of-way proposals of both pieces of legislation propose a trade that may be unacceptable to some tribes. You eliminate the Secretarial approval in exchange for tribes' regulations that require consultation with State officials, some type of public notification, and ultimately private citizen challenges of approved leases and rights-of-way. Traditional notions of tribal sovereignty protect tribes from incursion of States and nonmembers in the decisionmaking process.

The Southern Ute Tribe believes this is the wrong approach. We think that Congress should be concerned with whether or not the tribes are capable of making informed decisions in the first place and if they are capable of making those informed decisions, they should take the responsibility for their mistakes as well as for their good decisions.

No. 3. Tribes generally do not oppose Federal environmental laws. But the proposed legislation shouldn't treat tribal lands like public lands. For example, NEPA requirements and public comment are inconsistent with the internal decisionmaking aspect of tribal sovereignty. We suggested changes to correspond with IMDA—the Indian Mineral Development Act—confidentiality provisions. This is set forth in our written statement.

No. 4. The Southern Ute Indian Tribe joins with this gentleman in saying that this legislation should take issue with the dual tax-

ation caused by the *Cotton Petroleum Supreme Court* case. Cotton Petroleum makes a disincentive to production on tribal lands. We propose and add some legislative language in our written statement that would exempt future Indian energy development from State taxation to level the playing field.

Finally, something that is not in the proposed legislation would be a revision of the ambiguities that are contained in the Non-intercourse Act which was originally passed in 1790. The present language that is in the law came about in 1834. Many of the statutes affecting Indian tribes have the phrase in there, "Lands subject to a restriction by the United States against alienation."

There is no distinction between lands held in trust or lands held in fee. We give several examples, Mr. Chairman, of the problems caused by this in terms of trying to do economic development deals and mineral development deals with outside interests, outside the reservation—the banks and commercial lenders.

The Non-intercourse Act should not apply to interests in lands owned by tribes in fee unless that land is subsequently put in trust. If it is not clarified, the Non-intercourse language will continue to cause uncertainty as to its applicability and continued problems in commercial dealings.

I can tell you, Mr. Chairman, we have run into that time and time again in dealings that the Southern Ute Indian Tribe has had with various independent oil and gas companies and other oil and gas companies putting together deals where that becomes one of the big bones of contention as to whether or not the tribe has the power to do it or not.

In conclusion, Mr. Chairman, the Southern Ute Indian Tribe appreciates the opportunity to comment on this proposed legislation which is of such critical importance to all energy producing Indian tribes. We pledge our support to help this committee to work out suitable language that can be considered by the entire body.

Thank you, Mr. Chairman. I would be glad to try to answer any questions. I would ask that our written testimony be inserted in the record in its entirety.

The CHAIRMAN. Without objection.

[Prepared statement of Chairman Howard D. Richards, Sr. appears in appendix.]

The CHAIRMAN. Thank you.

Most of the questions will probably be submitted in writing as neither Senator Inouye nor Senator Thomas have been able to get back.

I want to just to ask one of each of you.

Mr. Trujillo, you mentioned 37 percent of the Navajos do not have electricity, as I understood you to say. That is certainly a sad commentary. What efforts is the tribe doing to bring that number down? Are you getting any help from the utilities?

Mr. TRUJILLO. Thank you, Mr. Chairman. Right now what we are doing is working with our utility organization, the Navajo Tribal Utility Authority. We have a bill which is called the Navajo Electrification Demonstration Program which was authorized for $75 million over 5 years.

Up to this point we have received $3 million. We have been able to bring 500 homes electricity. What we are looking at, too, is

through our new paradigm as we begin to develop new generation capabilities, we are looking at developing a criteria that would also help support rural electrification for our own tribes. This would break that ironic situation where we have a generating station that is producing up to 1,500 megawatts of power. We have homes 1,500 feet away that do not have electricity.

We are working to improve that, Mr. Chairman.

The CHAIRMAN. You provide power for Los Angeles but some of your own people cannot get it right next door?

Mr. TRUJILLO. That is correct, sir.

The CHAIRMAN. That is sad.

Mr. Hill, your testimony indicates that you oppose some provisions in S. 424 and S. 522 that I thought would streamline the mineral lease approval process to put tribes in charge more than the Administration.

The current problem we have with the Bureau, the BLM, and the MMS, I thought the goal really was to try to replace that with tribal regulations and tribal control.

Would you like to expand on that just a moment? What would you do to modify the existing process to make sure that tribes do have more control?

Mr. HILL. I guess where we have the biggest problem in that basically is in the leasing process as the tribes go through the approval of sites, or in areas that we are going to develop oil and gas. It is basically in the areas of title. From our area we send it to the regional office in Billings. That takes a long time to do a title search on the lands. That is what seems to hold us back. That is basically the biggest problem that I see in that.

The CHAIRMAN. Maybe the last question to Mr. Maynes.

Living there I know very well how progressive the Southern Utes are and what a terrific energy story they have to tell. I understand other tribes are now visiting the Southern Utes to see how they develop their own natural resources. I think that is terrific. They have become a model for a lot of Indian tribes.

I just want to say that I am just very proud to have been living in that area and watching the development of the Southern Ute Tribe. Just for the information for the committee and any interested people, that tribe has now become the largest employer in Southwest Colorado, not just the county of LaPlata, but in about a four or five country area. They are the largest employer.

More than one-half the employees are non-Indians. So with all of the development that has gone on with that Tribe, they have helped everybody, not just the tribal members. They have helped everybody in the area. I would like to think that is a standard that we should have all tribes follow in a traditional way of Indian sharing, that they not only provide for their own people, but in fact they have been good enough to provide for a lot of other people, too.

Thank you all for appearing here. There will probably be some questions in writing that will be submitted to you.

Now we will go to the last panel. Unfortunately, we only have about 15 or 20 minutes before I have to go to another meeting.

David Lester, executive director, council for Energy Resource Tribes, and Bob Gough, secretary of the Intertribal Council on Utility Policy, please come forward.

We will start with David. Your complete testimony will be included in the record and if you would like to abbreviate your testimony, that would be good for us. It is nice to see you again.

STATEMENT OF DAVID LESTER, EXECUTIVE DIRECTOR, COUNCIL FOR ENERGY RESOURCE TRIBES [CERT], DENVER, CO, ACCOMPANIED BY VICTOR ROUBIDOUX, BOARD MEMBER, COUNCIL OF ENERGY RESOURCE TRIBES

Mr. LESTER. It is nice to see you, Mr. Chairman.

Thank you very much for the opportunity to come before the committee to say a few words about the two bills that we are very excited about. We are very grateful for the work that your staff has done in working with us, Indian tribes, and other tribal organizations in pulling together a national perspective on this.

Outside of the remarks that I have prepared, I was very taken by the discussion about what will it take to increase Indian production for domestic tribal use within their own economies for their own people, as well as energy to sell to make America more secure in her energy needs.

The key word, I think, is "incentives." Increased production follows increased incentives. We want to increase the exercise of our sovereignty, but we don't want a decrease in trust protection or in the efficient administration of the trust responsibility. Right now the administration of trust responsibility within the Department of the Interior falls across four separate agencies. That is a decision that was made some 20 years ago.

If the Commission is established, as the Department's remarks indicated that they are committed to do, a revisit of how it carries out the administration of its trust responsibilities would be very welcome, particularly if that were staffed or at least the Commissioners came from energy producing tribes. We hope that the Commission could increase the accountability of the trust.

There has not been enough emphasis in recent discussions of trust. The trust has a protection or enforcement component to it as well. It is all well and good to say that the tribe can negotiate the best deal it can across the table if that table is even, is equitable, and is not asymmetrical in terms of the tilt of the table against the tribe. If we have a fair negotiating table, then the tribe can negotiate very fair deals.

The question, though, is: Who is monitoring to assure that the deals that they won at the table are actually being fulfilled in operation? That is a trust responsibility.

We support leveling the tax field as well. There are disincentives in the tax structure against the production of Indian energy resources in this country.

The trust responsibility makes it clear that need should be met with support from both the Department of Energy and the Department of the Interior for technical assistance, both in terms of building tribal institutional capacity and technical assistance in doing the resource assessments.

Information in this business is power. He who has the best information at the negotiation table has the best advantage in terms of coming out with a deal favorable to their interests. Tribes are often disadvantaged in information about their own resources. They are

relying on companies to come in with their own data collection and their own resource assessments.

As we saw in the *Navajo* case, the companies have no obligation to put all the information on the table for the tribes to know. We believe that is a violation of the trust. We think that the trust requires that the tribe be given assistance so that the asymmetrical nature of the negotiations is removed and we have a level playing field.

We also mentioned strengthening the role of the Federal Government as they market for tribal energy, both fuel and electricity produced from Indian energy resources. The U.S. Government is the largest consumer of energy in the world, both in fuels and in electricity.

The tribes have gone to agencies, have gone to facilities, and have gone to Federal agencies, often with no success in terms of coming together as partners in development of projects. It is hard to get a generation project going. It is hard to get a refinery going. It is hard to develop a project if you don't have some assurance that you have a customer at the other end of the deal. Investors walk away unless they can see that there is a customer.

The Federal Government could play an important role in igniting this by being the customer of first choice for many of these tribal projects.

We are also encouraged by the role that energy efficiency could play in Indian country because our homes, our facilities, our public buildings, have not been built with energy efficiency in mind.

We are not only the poorest communities in America, but a higher percentage of our disposable income is going out the smokestack, our windows, and the cracks in the doors of our homes and our facilities.

Again, the incentives should be that the savings stay within those programs to increase and improve services. The beneficiary should not be the U.S. Treasury but rather improved services to local Indians.

We have comments on particular parts of the bill. We will expand on those because we think this is really important that we bring energy policy in Indian country into and integrated with national energy policy. We need to integrate this into the policy framework. We also need to be sure that we can access transmission and that we can access the market place and be players in the biggest energy market in the world.

I would ask that my written testimony be placed in the record.

[Prepared statement of Mr. Lester appears in appendix.]

The CHAIRMAN. Obviously there are some good in each of these bills and maybe some not quite so good. What we hope to do is take the best of both. I have suggestions to try to make it a better bill.

Mr. LESTER.

Mr. Chairman, the treasurer of the Iowa Tribe of Oklahoma, who is a member of the CERT Board of Directors and the chairman of the CERT Board could not be with us. I would like to introduce Victor Roubidoux who is accompanying me today.

The CHAIRMAN. Good afternoon.

If you have some comments, go ahead and present them.

Your name for the record?

STATEMENT OF VICTOR ROUBIDOUX, BOARD MEMBER, COUNCIL OF ENERGY RESOURCE TRIBES

Mr. ROUBIDOUX. Good afternoon, Mr. Chairman and members of the committee. I would like to thank the committee for holding this hearing and to give the tribes the opportunity to testify on their energy visions and their plans for the future.

My name is Victor Roubidoux and I am a board member of the Council of Energy Resource Tribes. I am also the tribal treasurer for the Iowa Tribe of Oklahoma. I am pleased to be here today to offer brief comments regarding the importance of the proposed Indian energy legislation.

The Iowa Tribe of Oklahoma is working with CERT for the advancement of all tribes toward the National Tribal Energy Vision adopted by CERT tribes which states that each sovereign Indian tribe will have a sufficient and reliable supply of electricity at reasonable costs to support his social and economic well being.

The Iowa Tribe and CERT strongly support S. 424 and S. 522 and urge its enactment. Each tribe is distinct in their energy development to achieve their energy vision. The Iowa energy plan focuses on three areas: Energy development on our tribal lands; energy procurement opportunities with our tribally-owned energy marketing company; and energy efficiency and tribal member energy programs.

The legislation to be considered will provide assistance for capacity building and to bring down Federal policy, regulatory, and financial barriers for tribes to become full partner participants in the electricity market place. From my tribe's projects, we would directly benefit by the grants to further enhance a hybrid wind and natural gas distributive generation project to serve the load of our tribal headquarters and the potential generation project on our tribal trust lands.

Also, our tribally-owned energy marketing company, BKJ Energy, has partnered with Cintroleum, an Oklahoma energy research company. BKJ Energy will provide natural gas, feed stock, to gas to liquid production, and demonstration project under the DOE's Ultraclean Fuels Program. The pilot demonstration facility at the Port of Catoosa near Tulsa, Oklahoma, is under construction, and production of the clean diesel is expected this summer.

This partnership aligns itself with the tribe's overall environmental policy. Producing a clean and efficient fuel is a cornerstone and philosophy. We strongly urge the creation of the Office of Indian Energy Policy and Programs at DOE. This Office would be essential to promote tribal sovereignty and economic self-sufficiency and move these proposals into reality.

Thank you, Mr. Chairman, for your time and attention.

The CHAIRMAN. Thank you.

Mr. Gough.

STATEMENT OF BOB GOUGH, SECRETARY OF THE INTERTRIBAL COUNCIL ON UTILITY POLICY [COUP], ROSEBUD, SD

Mr. GOUGH. Thank you, Mr. Chairman, and members of the committee. My name is Bob Gough. I serve as the Secretary of the Intertribal Council on Utility Policy. I also am part of the Rosebud

Sioux Tribe Utilities Commission. Both are headquartered out there.

Rosebud, as you may know, has very recently joined a very small group of energy generators in being able to be the first tribe as a commercial generator of wind energy in the United States. We are delighted to be able to say that.

It has taken us eight years to go through all the hoops and hurdles to try to get this one project up. We think there are a number of things in this bill that could certain speed that process up. We have very detailed comments in our written testimony.

There are a couple of things that I would like to go over with the Committee and bring to their attention. In your packet there are some maps that we have provided and some materials that show the tremendous energy resources, particularly the renewable energy resources, in Indian country—wind, solar, geothermal, and biomass. There is a tremendous opportunity for these to be the foundations for sustainable homeland economic development for tribes today.

When we start looking at the time it takes to actually put in renewables, we are talking a matter of months rather than a matter of years. There is no reason that these kinds of things cannot be expedited. I just agree with the comments of David Lester that there is a need for integration for tribal energy into the larger system. But it may not mean that we have to wait for an Indian energy bill to go through the whole process with a complete new Federal energy policy. There are things that need to be done today.

If you look at incentives, tribes are the only group that the Federal Government has a trust responsibility for, and yet it is the only group in terms of renewables that there are no incentives for. The renewables incentives go to production tax credit for those businesses and for-profit operations. It goes for municipalities and subdivisions of States. Tribes are left out of the picture in terms of incentives.

In our case we are not asking for increased incentives. We are asking to be able to participate in the incentives that already exists. This bill does that with regard to REPI, the Renewable Energy Productive Incentive. We would like to see that bill also do that in terms of making the production tax credit available either as tradeable, assignable, or as an offset.

When you look at the renewable potential, particularly wind in the Northern Plains, 12 reservations have something on the order of 300 gigawatts of wind power potential. To put that in perspective, that's 100 times more than all of the Missouri River produced. It is about half of the installed electrical capacity in the United States. It is a tremendous resource.

But we need to be able to get it on the grid. That grid is run and owned by the Federal Government, the Western Area Power Administration. We need Federal help to work as full treaty partners, and to be able to get our product on that farm-to-market road.

Right now there are disincentives for tribes and for renewables to get on that grid. We are the new kids on the block in a very old industry. We are going to need to have some of those rules changed in a fair way to make sure that we have a level playing field to be able to bring this kind of production on board.

The Rosebud Tribe is very excited. Our 8-year planning to go in to produce a single turbine of 750 kilowatts has taught us many lessons. We have taken it through many hurdles. We are ready to spread that information with the other tribes and share that. Development can now take place in a much more rapid pace because of that.

We have appreciated the opportunities of working with the various Federal agencies. RUS had terms of access for loan money that have been available for 50 or 60 years to co-ops but not to tribes and not for renewables. They are today because of this process.

What we would ask also is to see if this bill can be done in a way that meets the criticism and concerns, and addresses those issues brought out in this hearing. It may be moved as a stand alone. I think that is very important. There are things that could be done today and not hold tribal energy hostage to more divisive energy debate that may take years to ultimately resolve.

Many of the provisions of this bill were approved, as I understand it, in conference committee last year but the overall bill didn't move forward. We have both sides of the aisle recognizing a trust responsibility to tribes. We think this is one way to do it.

The Federal Government has a tremendous role to play in jump starting the purchase of tribal power, particularly renewables. By the year 2005, 19 months ago, 2.5 percent of the entire Federal Government's electrical energy purchase consumption is supposed to come from renewable energy. Can tribes be first in line for that kind of market?

That kind of power purchase agreement and interconnection agreements, that the Federal Government can work with the tribes as full treaty partners, can really make the difference in moving tribes ahead for producing sustainable homeland economic development, energy independence for the United States, and a new economic opportunity for Indian tribes.

With that, I will take questions or yield the time to the other members here. I would ask that my statement be placed in the record in its entirety.

[Prepared statement of Mr. Gough appears in appendix.]

The CHAIRMAN. We will have to submit our questions because we are running out of time.

It is my intention to try to bring a consensus bill up for a vote in the committee just as quickly as we can meld it, hopefully within a couple of weeks. But we will keep the record open at least for two weeks if you have any additional comments or suggestions as to how we can improve them. I would appreciate your doing that.

Mr. LESTER. With your permission, Mr. Chairman, we would like to work with your staff to help blend the two bills and come out with the strongest possible bill in support of the tribal vision.

The CHAIRMAN. I think the timing is right for it, very frankly. I don't think that there is anyone in the country that doesn't have energy on their mind now, with paying up to $2 and more per gallon of gasoline on the West Coast, and the dependency on the very country that we are about to get engaged in a war. It is just unbelievable that we could do that. So, I think the timing is really right.

Mr. GOUGH. Mr. Chairman, if I may, I have the honor of inviting you, the other members of the committee, and your staff, to the Rosebud Sioux Indian Reservation on May 1, for our dedication of the beginning of the revolution of new renewable energy in Indian Country. Please come.

The CHAIRMAN. I have always been interested in revolutions, so I will try to get out there. [Laughter.]

Thank you. With that, this committee is adjourned.

[Whereupon, at 4:04 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM WYOMING

Thank you Mr. Chairman. I would like to welcome Theresa Rosier, Counselor to the Assistant Secretary for Indian Affairs at the Department of the Interior, Vicky Bailey, Assistant Secretary for Policy and International Affairs at the Department of Energy, and tribal leaders, including Chairman Vernon Hill of the Eastern Shoshone Business Council, for being here with us today.

As Congress continues to develop a comprehensive energy bill, Indian resources should not be overlooked. American Indian lands contain a significant amount of the nation's natural resources. The Eastern Shoshone and the Northern Arapaho tribes both rely on revenue derived from natural resources—oil and gas in particular—to fund governmental operations and provide services to their members. Although oil and gas are important to these tribes, energy development potential has not been fully recognized on the Wind River Reservation, which is over 2 million acres in size. It is in our country's best interest to develop these resources in an environmentally responsible manner.

I am pleased to be a cosponsor of Senator Campbell's energy bill because it establishes an Indian energy resource development program within the Department of Energy. Senators Inouye and Bingaman have also introduced legislation to address the energy needs of American Indians. It is interesting to note that 9 of the 15 members on the Indian Affairs Committee are also members of the Senate Energy Committee. Clearly, Indian energy is a priority for me and my western colleagues and I look forward to working with them to develop a bipartisan measure that will help American Indian economies and provide our country with reliable sources of energy Thank you, Mr. Chairman.

PREPARED STATEMENT OF THERESA ROSIER, COUNSELOR TO THE ASSISTANT SECRETARY—INDIAN AFFAIRS DEPARTMENT OF THE INTERIOR

Good afternoon, chairman, vice chairman and members of the committee. My name is Theresa Rosier and I am the counselor to the Assistant Secretary—Indian Affairs within the Department of the Interior. I am pleased to be here today to present the Department of the Interior's views on S. 522, the Native American Energy Development and Self-Determination Act of 2003 and S. 424, the Tribal Energy Self-Sufficiency Act.

The Bureau of Indian Affairs [BIA] manages approximately 56 million acres of land held in trust for individual Indians and Indian tribes in the lower 48 States and Alaska. Currently, there are 1.81 million acres of actively leased oil, gas and coal in various phases of exploration and development. It is estimated that an additional 15 million acres of undeveloped energy resources exist on individual and tribal land. Indian energy development plays an important role in the domestic production of fossil and renewable energy. In fact, production of energy minerals from Indian lands continues to represent over 10 percent of the total Federal onshore pro-

duction. Moreover, the production from Indian lands in the year 2001 was 13.1 million barrels of oil, 285 billion cubic feet of gas and 29.4 million short tons of coal. Since most Indian lands are located in sedimentary basins possessing geophysical features frequently associated with natural gas and oil, the potential for further energy development on Indian lands is exciting.

Increased energy development in Indian and Alaska Native communities means increased jobs in these communities. In many Indian and Alaska Native communities, joblessness and underemployment are painfully acute. This dismal state of affairs has impeded tribal economic development and self-sufficiency. More than ever, tribes need the job and training opportunities that come hand-in-hand with expanded mineral and energy development.

One of the tragic ironies of life in Indian communities is that tribes possess substantial energy resources yet pay some of the highest electrical costs or even lack complete access to electricity. The Navajo, for example, reside on lands abundant in minerals. They have coal, hydrocarbons, and photovoltaic assets. Yet a huge proportion of the Navajo people lack access to any electricity at all. Unfortunately, blackouts, brownouts, and other kinds of energy disruptions are quite common in many Indian communities.

Consistent with the President's National Energy Policy to secure America's energy future, increased energy development in Indian and Alaska Native communities could help the Nation have more reliable home grown energy supplies. S. 522 promotes increased and efficient energy development and production in an environmentally sound manner.

While the Administration supports the goals and objectives of S. 522, the promotion of both tribal self-determination and economic development, there are several provisions that we look forward to working with the committee on prior to moving forward in the legislative process. Because this legislation has programs for the Department of Energy, the Department of the Interior, and Housing and Urban Development, my testimony is appropriately focused on those provisions relating to the Department of the Interior.

S. 522 builds upon the self-determination principles of the Indian Mineral Development Act of 1982 to increase tribal control over the exploration, extraction, processing and development of fossil and renewable resources. Indian tribes are in the best position to determine how and when minerals are to be extracted from their lands. After all, increased tribal regulation and responsibility for their resources is consistent with tribal sovereignty.

S. 552 would authorize individual Indians and tribal governments to enter into energy development leases or business agreements without Federal review as long as certain preconditions have been met. The preconditions are that the "Secretary" has already approved tribal regulations which govern these leases and business agreements, and that these leases and agreements do not exceed 30 years. Moreover, the bill authorizes tribes to grant rights-of-way over tribal lands for pipelines, electrical transmission or distribution lines without Federal review if the "Secretary" has approved the tribal regulations which govern the right-of-way, the right-of-way does not exceed 30 years, and the pipeline, transmission or distribution lines serve a facility located on Indian lands or the energy has been produced on Indian land. The Department supports tribal regulation and expedited review of these regulatory processes.

As drafted, it is unclear whether this section would apply to the Department of the Interior or the Department of Energy. The Department believes that it is more appropriate for the Secretary of the Interior to approve tribal regulations which govern the leasing of trust or restricted lands, business agreements, and rights-of-way conveyance because the documentation necessary to approve such tribal regulations requires trust records and payments that are under the purview of the Department of the Interior.

Generally, the Department is also supportive of the creation of the Indian Energy Resource Commission. Among other things, the Commission is tasked to recommend improvements to the current tax structure governing Indian energy production. The current tax structure in Indian country imposes multiple severance and ad valorem taxes on those who extract and operate energy enterprises in Indian country.

We look to the Commission to recommend ways to facilitate economic growth in Indian and Alaska Native communities. Hopefully, this will mean more tribal joint ventures, greater tribal participation in the building of transmission and distribution lines, and increased tribal ownership of power plants and utility companies.

The Department is strongly opposed to the proposed power of the Commission to subpoena testimony and records. We do not believe it is necessary for the Commission's mission. The Commission should not be an investigatory body, but rather an entity that looks to what the future can hold for Indian energy development. In ad-

dition, as we understand it, even the General Accounting Office does not have authority to subpoena records from Federal agencies.

President Bush's National Energy Policy report established a comprehensive, long-term energy strategy for securing America's energy future. Both renewable and nonrenewable Indian energy is uniquely positioned to play a vital role as the Nation begins to curb its dependence on foreign energy supplies. In addition to traditional energy sources, alternative and renewable energy sources are also a fundamental component to the President's energy policy. Geothermal, wind, hydro, and solar energy, while a small percentage of total U.S. energy supply and consumption, are important to the long-term energy security of this Nation.

The purposes of S. 424 are to establish an Office of Indian Energy Policy and Programs at the Department of Energy; to encourage greater tribal self-determination in the regulation of Indian energy leases, rights-of-way, and business agreements; to assess and evaluate the Indian Mineral Development Act of 1982; to conduct various studies and feasibility analysis related to Indian renewable and nonrenewable energy; and to authorize certain Indian energy related provisions. My testimony will focus on those provisions pertaining to the Department of the Interior.

S. 424 would authorize Indian tribes to lease tribal land for electric generation, transmission or distribution, and for a facility to refine renewable or nonrenewable energy without Department of the Interior approval. This expedited leasing process is available to a tribe if two preconditions have been met: (1) the lease was carried out under regulations which were already approved by the Secretary of the Interior pursuant to provisions in the bill, and (2) the lease does not exceed 30 years. Moreover, tribes are also authorized to grant a right-of-way across tribal lands without Secretary of the Interior approval if the right-of way is executed with regulations pre-approved by the Secretary, the right-of-way does not exceed 30 years, and the transmission or distribution line serves a facility located on Indian land, or aids the processing of energy developed on Indian lands. In addition, S. 424 authorizes the approval of energy business agreements without Secretarial review if a comprehensive environmental review process has been completed.

These provisions promote increased tribal self-determination as tribes administer and regulate their tribal energy policy. Moreover, energy development promotes increased economic opportunities in Indian communities. An efficient, locally controlled regulatory structure in Indian communities creates a business friendly environment that encourages exciting partnerships between tribes, the private sector and the Federal Government.

This section of the bill requires the Secretary of the Interior to conduct a review of the Indian Mineral Development Act [IMDA] of 1982 and report to Congress within 1 year. The IMDA represented a fundamental shift in Indian energy development. Since its enactment, Indian tribes have become more proactive in developing their energy resources. Since it has been 20 years since its enactment, assessing the IMDA is important as tribes and Department begin to develop a national Indian energy plan. Currently, the BIA is planning a framework for formal consultation with tribal leaders regarding a national Indian energy policy. These consultations will build upon the groundwork that the BIA has recently completed. Since April the BIA has held six Indian energy policy meetings throughout the United States with representatives from more than 100 tribes to discuss the development of a tribally driven energy policy.

Thank you for the opportunity to testify before you today to speak on a subject that is a priority for this Administration, tribal leaders and the American public. It is a very exciting and opportune time to focus on increased Indian energy development. I welcome any questions that the committee may have.

Prepared Statement of Vicky Bailey, Assistant Secretary for Policy and International Affairs

Thank you, Mr. Chairman and members of the committee. I am pleased to be here to discuss proposed legislation, S. 424 and S. 522, regarding Indian energy policy and to provide you information on the Department's current structure and ongoing program. These activities recognize Secretary Abraham's affirmation of the Department's commitment to meet its responsibilities to Indian country in a manner consistent with the government-to-government relationship that exists between federally recognized tribes and the Department.

Introduction Before I begin my formal testimony, I would like to commend you, Mr. Chairman, and the entire committee on your leadership in addressing the challenging issues before us. We all know that the United States is better served when the Federal Government and Indian tribes work together to meet common objectives.

From an energy perspective, Native American reservations contain large reserves of oil and gas. There are an estimated 890 million barrels of oil and natural-gas liquids, and 5.6 trillion cubic feet of gas on tribal lands. This translates into huge potential revenues for the tribes even when conservative production estimates are used.

President Bush recognizes the importance of energy to America: In his second week in office, when the President established a group to draft a national energy policy, he said that he wanted to "promote dependable, affordable, and environmentally sound production and distribution of energy for the future." Indian energy resource development and energy policy in general are areas where the Department and Indian tribes share many mutual interests and can together influence America's future in a constructive manner. As Secretary Abraham has stated, the Administration wants to work with Congress on provisions that facilitate energy development on tribal lands while enhancing and protecting the environment.

The Administration's commitment to a comprehensive and balanced national energy policy is in the best interest of all Americans, and that is why the President announced his National Energy Policy in May 2001, less than 4 months after he took office. We face many energy challenges that require attention now. Enacting an effective national energy policy during the 108th Congress is one of the President's top priorities, and we are pleased that both houses of Congress are moving forward. As you know, today, a key House subcommittee is marking up comprehensive energy legislation. The short- and long-term energy supply and demand issues before us, in addition to posing challenges, provide an opportunity for us to improve our environment and our economy while enhancing our energy future.

Americans share many common concerns regarding that energy future. Even shared concerns may not offer one-size-fits-all solutions. Some issues will require different approaches that recognize the unique dynamics at play due to any number of factors and circumstances. Certainly there are issues unique to Indian country, and we must have the tools to address them within our national energy policy framework.

I would like to provide an overview of the Department of Energy's structure in order to provide a reference point for the proposed legislation. In implementing Secretary Abraham's written direction to Department heads requesting that they honor the government-to-government relationship that exists between the Federal Government and federally recognized Indian tribes, tribal points of contact have been established. These 50 points of contact focus on relations with Native American tribes and Alaska Natives.

In addition, within DOE's Office of Congressional and Intergovernmental affairs, a Director of Indian Affairs serves as the Department's primary point of contact on Native American issues. A recent vacancy in that position should be filled in the very near future, but the work of the Director continues to be performed through our Office of Intergovernmental and External Affairs.

DOE and our power marketing administrations are committed to continuing our work with tribal governments on the many issues in which we have a common interest. At this time, I would like to provide some insight into how DOE's relationships with American Indians work at the program and at the site levels. These representative examples of program activities and projects are intended to highlight our continuing efforts to improve the energy future specifically for Native American Tribes.

Office of Economic Impact and Diversity [ED]

ED supports nine Native American/Tribal-owned financial institutions through the Bank Deposit Financial Assistance Program. These banks are located in a seven-state area: California, Kansas, Missouri, Montana, North Carolina, and Oklahoma, and hold a total of $19.8 million in certificates of deposit to provide development loans to minority and women-owned business enterprises. The Native American National Bank is the first tribal owned American owned bank to serve as a "Trustee" for the Department's Bank Deposit Financial Assistance Program, and manages $3.7 million in for the Department of Energy.

ED provides financial support for the National Center for American Indian Enterprise Development, which educates and brings together Indian individuals, business owners and corporations seeking business relationships with the Indian business community.

Office of Energy Efficiency and Renewable Energy [EE]

EE is developing a Web-based tool to aid tribes in addressing their energy needs. The site is intended to provide information on the process of developing energy resources, case studies, and other information.

EE has participated in numerous tribal conferences, developed a brochure, and developed a website as a means of promoting the program and renewable energy technology transfer.

EE has completed installation of a 750 kW turbine on the Rosebud Sioux Indian Reservation (Rosebud, SD). The project successfully demonstrated the use of "green tags" to finance the installation and was the first tribe to obtain a USDA Rural Utility Service loan for commercial wind development.

Western Area Power Administration [WAPA]

WAPA's 15-State service area includes more than 300 tribes, each with distinct histories, values, issues and priorities. Transmission line rights-of-way cross 900 miles of reservation and tribal lands—a total of approximately 10,500 acres. In view of the importance of WAPA's work with Native Americans, a full-time Native American Liaison [NAL] position has been established at the Corporate Services Office. The NAL will provide consultation guidance to all WAPA Regional offices and business functions to develop manage and coordinate Native American-related initiatives.

WAPA is currently allocating power, entering sales contracts and negotiating delivery arrangements to ensure Native Americans receive the benefit of Federal power. WAPA modified its qualification requirements to make it possible for Indian tribes to become new customers. WAPA continues to extend power allocations to Native American beneficiaries as old contracts expire throughout its service territory. Western will continue its negotiations to put in place power contracts with 90 Indian tribes and Pueblos in 11 States.

The Department is reviewing the provisions of S. 424 and S. 522. These two bills are comprehensive, and we support the goal of maximizing environmentally sound resource development on tribal lands. We will continue to study the specific provisions of the legislation and look forward to working with you toward achievement of our mutual objectives.

That concludes my prepared statement, Mr. Chairman. I hope that my testimony provides you and the other members of the committee with a good understanding or the importance this Administration attaches to our work with American Indian tribes and Alaska Natives in the context of the President's National Energy Policy. I would be pleased to respond to any questions you may have.

TESTIMONY OF THE NAVAJO NATION

SUBMITTED FOR THE RECORD OF THE
U.S. SENATE COMMITTEE ON INDIAN AFFAIRS
HEARING ON PENDING LEGISLATION RELATED TO INDIAN ENERGY

March 19, 2003

INTRODUCTION

The Navajo Nation appreciates this opportunity to share its views on S. 522, the "Native American Energy Development and Self Determination Act of 2003," and S. 424, the "Tribal Energy Self Sufficiency Act." On behalf of President Joe Shirley and Speaker of the Navajo Council, Lawrence Morgan, we commend this Committee for taking up the important issue of Indian energy production. The fact that Congress is interested in developing a national policy for fossil fuels renewable resources in Indian Country is but one more indication that energy resource tribes are poised on the cusp of realizing their greatest possibilities.

Yet, as Congress, the Administration, Tribal Governments and Private Industry consider how best to harness and unleash tribal energy in the 21st century, the Navajo Nation urges stakeholders to ask: 1) who will benefit from new energy production on tribal land? 2) who will control new energy production on tribal land? and 3) who will be accountable for energy production on tribal land? The Navajo Nation respectfully submits that the answers to all of these questions must first and foremost include tribes themselves.

The Navajo Nation and the Navajo people occupy a unique position in this discussion. Among over 275 reservations and over 560 federally recognized Indian tribal governments, the Navajo have the largest Indian reservation, encompassing over 25,500 square miles within the states of Arizona, New Mexico and Utah, and the largest total land area (including Tribal fee and other non-trust lands), covering almost 18 million acres—larger than the states of Connecticut, Delaware, Maryland, Massachusetts and Rhode Island combined. According to the 2000 United States Census, the Navajo people number approximately 300,000.

The Navajo Nation has vast resources of fossil fuels and renewable natural resources. Since 1963, the Navajo Nation coal mines have generated more than $10.5 billion in gross revenues on more than 660 mm tons of exceptionally high grade coal. It is estimated there are 4 billion more tons of coal where that came from. In the northern section of the reservation is Aneth, Utah, commonly referred to as the Kuwait of Navajo. The Aneth oil field is one of the largest producing fields in the West and has produced more than 400 million barrels of oil since the late 1950s. The natural gas reserves of the Navajo Nation have been developed relatively recently. And renewables? There is an abundance of sun and wind within our four sacred mountains.

THE NAVAJO NATION'S ENERGY HISTORY

Who has generally benefited from energy production on the Navajo Nation?

When people turn on a switch, they generally don't stop and think about where the energy comes from that brings electricity to their fingertips. Most people in Los Angeles, Phoenix and Las Vegas probably don't realize that many of their homes, businesses and institutions directly benefit from coal that is converted into energy on the Navajo Nation. Yet, while the great cities of America's booming Southwest are largely powered by the non-renewable resources of the Navajo Nation, 56% of Navajo people still live below the poverty level, 75% of Navajo people have a per capita income less than their neighbors in Arizona, and 37% of Navajo

homes do not have electricity, even though many of those homes have transmission lines passing overhead.

Who has historically controlled energy production on the Navajo Nation?

Prior to the Self Determination Act of 1976, the Bureau of Indian Affairs (BIA) largely controlled the management of Indian reservations, including Navajo. While tribes were allowed nominal input into decisions about energy production on their land, the BIA had the final say. That meant that when it came to decisions about mining, drilling, generation and transmission, tribes generally had little control. On the Navajo Nation, energy resources like coal, oil, and gas were leased by the Tribe to private industry, according to terms set by the BIA. The Navajo Nation is still struggling with the legacy of those contracts.

Who was accountable for energy production decisions on the Navajo Nation?

In the 50's, 60's, and 70's, when BIA had nearly complete control of the approval of leases for energy production on reservations, there was little if any accountability for decisions that had grave and immediate impacts on the Navajo people. The Department of Interior answered to nobody and the corporate lessees answered only to their shareholders. Such assets and losses as environmental quality, infrastructure capacity and cultural integrity were not factored into the bottom-line.

ENERGY PRODUCTION TODAY ON THE NAVAJO NATION

Who is now benefiting?

Currently, the total annual revenue of the Navajo Nation is about $535 million, of which about 46% comes from fossil fuel development. There are 4 active surface mining operations, and 2 coal fired generating stations that provide jobs, coal royalties and taxes to the Navajo Nation. Energy production provides critically needed, well paying jobs to the Navajo people, who must survive against a crushing 41% unemployment rate. But Navajo's natural resources still provide far greater benefits for the region than the reservation. For example, California electric utility rate payers enjoy some of lowest cost fuel in the Southwest as a direct result of the Black Mesa and Kayenta Coal Mine.

Who currently controls energy production decisions on the Navajo Nation?

The Navajo Nation is still trying to overcome the legacy of the bad old technologies and the bad old policies that characterized much of Indian energy production in most of the twentieth century and failed to adequately protect our environment and people. Today, the majority of Navajo's energy operations are being administered under a lease paradigm, where the BIA continues to have final authority, while the Tribe gets a royalty but no ownership interest on mining, generation and transmission activities within its borders.

However, the Navajo Nation today is proactively exercising its sovereignty through improved resource management, as administered by the Navajo Executive Branch or Navajo Economic Enterprises, with oversight by the Navajo Council Resources Committee. The following five examples are indicative of Navajo's leadership within the realm of Indian Energy Production:

1. **Navajo Abandoned Mine Land Reclamation Department:** Since its inception in 1987, this department has reclaimed all abandoned coal mines on the reservation, inventoried nearly 1,000 abandoned non-coal mines (uranium and copper), and begun reclamation of non-coal mines to remove all dangerous conditions and restore the beneficial use of the land.

2. **Navajo Minerals Department:** Through a 1982 cooperative agreement with the Department of Interior's Office of Surface Mining (OSM), this department develops

tribal regulations and program policies on surface mining; assists OSM with inspection and enforcement of surface mining on Navajo; reviews mine permits, mine plans, jurisdictional and bond release information; and sponsors employment training and education in the areas of mining and mineral resources.

3. **Navajo Oil and Gas:** In 1994, the Navajo Nation Council created its own oil and gas company. Navajo Oil and Gas has recently taken over a pipeline and is partnering with Giant Industries to transport oil from the Aneth oil fields to the refineries. Navajo Oil and Gas is also looking into vertical integration, using Navajo oil or products derived there from, to develop gas stations on and off the reservations. In addition, Navajo Oil and Gas is involved in exploration efforts within the Aneth and Eastern Agency area.

4. **Navajo Electrification and Demonstration Project:** In 2001, Public Law 106-511, Section 602 authorized the U.S. Department of Interior to provide $15 million annually for five years to the Navajo Tribal Utility Authority (NTUA), an Economic Enterprise of the Navajo Nation, to connect the 18,000 Navajo homes that are not electrified to electricity. In its first year of funding, fiscal year 2002, NTUA received less than $3 million, but connected more than 400 homes to electricity by either extending power lines from pole to house or providing distributed power technologies, such as fuel cells, solar photovoltaics, solar thermal systems and wind technologies.

5. **Navajo Transmission Project:** The Diné Power Authority, which is an Economic Enterprise of the Navajo Nation, is developing a 500 kv (AC) transmission line from the Four Corners are to Southern Nevada. The line will provide critically needed transmission capability which will benefit the Southwestern power markets, including Arizona, California and Nevada by relieving constraints, allowing for expanded generation, lowering rates for consumers and providing a more secure national energy infrastructure. The Diné Power Authority has successfully completed environmental permitting for the 462-mile Navajo Transmission project (the largest transmission line in the United States with such clearances), as well as nearly all of the Right of Way approvals, and is now in advanced discussions with private partners on a financing and development agreement.

Who is currently accountable for energy production on the Navajo Nation?

Today, the Navajo Nation's Executive, Legislative and Judicial branches work together to protect the interests of the Navajo people through tribal regulations and codes on such matters as rights of way, land use permits, archaeological clearances and environmental enforcement. Where differences arise between the Navajo Nation and its corporate lessees, the Nation works diligently to find solutions that strike a balance between the needs of the business community, the natural environment, and cultural traditions of the Navajo people.

FUTURE ENERGY PRODUCTION ON THE NAVAJO NATION

Who will benefit?

The research the Navajo Nation has done thus far to work towards developing a Navajo energy policy indicates that three entities must benefit in order for energy development to succeed: 1) the Navajo Nation itself; 2) the companies invested in the Nation; and 3) the Navajo communities impacted by energy development. With that in mind, we are exploring how to incorporate the following four issues into the development of a Navajo energy policy: 1) the role of communities decision making; 2) the role of community benefits; 3) funding opportunities for renewable projects (i.e. completing rural electrification and integrating renewables into Navajo's overall energyportfolio); and 4) transitioning from a lessor/lessee paradigm to an ownership

paradigm (in which the Navajo Nation would have an interest in the energy production infrastucture, as well the products produced by Navajo resources).

Who will control?
The Nation is looking at ways to control its own destiny through 1) the development of a Navajo Nation Energy Office, and 2) the development of a research institute that would promote research in not only non-renewable or clean technology, but also household appliances that would be compatible with those non-renewable technologies. These are just some examples of ideas we considering to become an incubator of Indian Energy initiatives in the Southwest.

Who will be accountable?
In the recent decision of U.S. v. Navajo, the United States Supreme Court held that enforcement of the federal government's trust responsibility to protect tribal interests depends upon express statutory language that imposes liability on the United States. Absent a substantive source of law establishing specific fiduciary or trust responsibilities, the Court held that the federal judiciary has no basis from which to determine liability and reward compensation. This means that when Congress gives a United States Secretary authority over managerial control of energy development in Indian Country, without spelling out how a breach of that control will be sanctioned, there is no mechanism to impose accountability upon the final decision maker. The decision in U.S. v. Navajo imposes a grave responsibility upon Congress, if Congress is genuinely interested in promoting tribal self-determination. Future authorizations must either prescribe the scope of federal responsibility, and articulate the liability for not meeting said responsibility, or take the federal supervision out of tribal regulations altogether so that tribes may exercise control over matters for which they ultimately bear liability.

PENDING LEGISLATION

The Navajo Nation has learned the hard way that Congress makes a mistake when it authorizes federal agencies to exercise prescriptive control over energy development in Indian Country. The Supreme Court's decision in U.S. v. Navajo makes it clear that Congress must expressly differentiate between trust responsibility and self-determination when crafting legislation. The Court said that when Congress enacts a law that aims to enhance self-determination, giving the federal government, rather than the tribes the lead role in negotiation is directly at odds with self-determination.

Furthermore, Congress must henceforth draft legislation imposing liability on the United States for breach of trust duties. Congress must be more careful and deliberate in drafting laws concerning Indians. The Nation looks forward to working with this Committee to ensure that pending legislation enables tribes to become the *lead* decision makers in their own energy development destinies and to hold the government accountable for its trust responsibility.

CONCLUSION

In conclusion, we note that as we testify today, discussing the future of Indian energy development, we do so acutely aware of the world events that are taking shape beyond the walls of this hearing room. This Committee knows that the Navajo Nation has never shied away from participating in the development and defense of our great country. As the 108th Congress and Bush Administration take decisive actions in response to world events, the Navajo Nation offers its continued support to protect our Shimá, our "homeland."

Today, domestic energy production is part of national defense. Just as our Code Talkers helped win World War II for the cause of freedom, the Navajo Nation can help the United States win the war against foreign energy dependence. The Navajo Nation is, quite literally, a power house of a partner. Thank you.

Supplemental Statement of President Joe Shirley, Jr.
Office of the President and Vice-President of the Navajo Nation
For the Record of the Senate Indian Affairs Committee
April 2, 2003

As President of the Navajo Nation, I wish to sincerely thank the Committee on Indian Affairs for this opportunity to provide supplemental testimony for the record of the Indian energy hearing held March 19, 2003. I extend special thanks to Chairman Campbell and Ranking Member Inouye for their thoughtful consideration of this issue. As well, I commend the tireless efforts of Senator Pete Domenici and Senator Jeff Bingaman to help tribes achieve self-determination through legislative initiatives designed to make wise use of tribal resources.

We recognize that S. 522, the Native American Energy and Development and Self-Determination Act, introduced by Senator Campbell and Senator Domenici on March 5, 2003, and S. 424, the Tribal Energy Self-Sufficiency Act, introduced by Senators Bingaman, Inouye, Campbell and Daschle on February 14, 2003, reflect a tremendous amount of Congressional effort and dedication. For this, the Navajo Nation is most grateful.

The following is the legislative analysis of the executive branch of the Navajo Nation of S. 522 and S. 424. This analysis summarizes what my Administration considers to be the legislations' key elements of value, and concern. Recommendations for improvement are respectfully submitted for the Senate Indian Affairs Committee's consideration:

Key Elements of Value in S. 424 and S. 522

S. 424, Sec. 101, Comprehensive Indian Energy Program: Because all tribes are different, requiring varying levels of energy development assistance, a comprehensive approach is essential to broadly stimulate Indian energy potential. The sliding scale of activity proposed through Indian Energy Education, Planning and Management Assistance will benefit tribes, no matter where they stand along the continuum of energy development and electrification need. For a tribe ready to assume ownership risk, the loan guarantee program is essential to enable tribes to acquire equity interest in their own energy infrastructure and move beyond the traditional leasing paradigm. For a tribe ready to compete in the energy market, the Indian Energy Preference provides only as much market guarantee as is consistent with the federal trust responsibility.

S. 424, Sec. 102, Office of Indian Energy Policy and Programs: It is necessary for tribal energy programs to have a home at the Department of Energy. Without such a dedicated office as the Office of Indian Energy Policy and Programs, tribal initiatives will likely be programmatic orphans that are unwanted and misunderstood by existing programs whose performance goals do not include tribally oriented criteria. The result is a situation that is less than ideal for the Tribe or the Department. The experience of the Navajo Electrification Demonstration Project illustrates this point.

In 2001, President Bush signed into law PL 106-511, Section 602, authorizing the Department of Energy (DOE) to provide $15 million annually to the Navajo Tribal Utility Authority (NTUA) to provide access to electricity from fiscal year 2002 through fiscal year 2007. In 2002 and 2003, the Navajo Electrification Demonstration Project was funded at or below $3 million in the "Indian Energy Renewables" section of the Department of Energy appropriations bill. As a result, DOE's Office of Solar Energy Technologies became the programmatic administrator for the Navajo Electrification Demonstration Project.

Unfortunately, not all of the Electrification Demonstration Project's activities involve solar technologies, which creates difficulties for the Office of Solar Technologies, whose performance goals for monies spent are tied directly to photovoltaic projects. Consequently, much effort is made to adjust the priorities of the Navajo Electrification Demonstration Project to meet the needs of this particular program office within DOE. The Navajo Nation is hopeful that an Office of Indian Energy Policy and Programs would remedy this situation.

S. 424, Section 103, Siting Exclusion: The exclusion of any Regional Corporation or Native Corporation from the definition of "Indian Tribe" for siting energy facilities on tribal land is consistent with the facts that (1) regional and village land conveyance under the Alaska Native Claims Settlement Act, section 14(c), are not yet complete; and (2) by Resolution CJY-51-01 of Navajo Nation Council, the Navajo Nation supports the Vuntut Gwitchin's efforts to preserve their coexistence with the porcupine caribou in the State of Alaska and Navajo could therefore not support language that could allow oil and gas drilling in ANWR.

S. 424, Section 105, and S. 522, Section 2609, Indian Energy Study: Congress should be kept apprised of barriers and successes within the arena of tribal energy development. In April 2000, DOE's Energy Information Administration published "Energy Consumption and Renewable Energy Development Potential on Indian Lands." Follow up is necessary. However, the tribes themselves, rather than a federal agency, are in the best position to tell Congress about what is and is not working within their own communities. The Navajo Nation, the Council of Energy Resource Tribes (CERT) the National Laboratories, including Los Alamos National Laboratory and Lawrence Livermore National Laboratories, are currently in ongoing dialogue about how to promote bottom-up, rather than top-down approaches to information exchange.

S. 424, Section 108, Transmission Line Demonstration Project: The Navajo Nation has invested millions of dollars of its own funds in the Navajo Transmission Project (NTP), whose completion will address major market needs for expanded transmission and generation, especially in California, New Mexico, Nevada and Arizona; eliminate system constraints in the Southwestern electrical transmission system; permit expanded generations; stabilize regional electricity pricing; stabilize the regional power supply; and stimulate economic development and energy self-sufficiency for the Navajo Nation. Federal support remains critical to cover the cost of final pre-construction activities.

Specific authorization for grants to enable the Diné Power Authority to develop the NTP is essential.

S. 424, Section 301, Energy Efficiency Grants: Because Indian families pay a disproportionately higher percentage of their household income on energy costs than non-Indians, efficiency is crucial. Competitive grants that promote a suite of energy efficiency activities promote common sense policies that will help tribes protect their money, health and environment.

S. 424, Sec. 302, Rural and Remote Community Electrification Grants: Many, if not most, of tribal communities are rural communities and as such need the utmost support and cooperation of the Secretary of Agriculture, Secretary of Energy and Secretary of Interior in order to develop the modern electricity infrastructure that is a predicate for education and economic development. Competitive grants to tribal communities and colleges will greatly help tribes prosper.

S. 522, Sec. 2603, Indian Energy Resource Development Program: This is a comprehensive approach that recognizes the sliding scale of need for tribes to develop their own energy resources. For those tribes that are prepared to assume the risk of owning an interest in their own energy product, capital is the key. Low interest loans to promote development and vertical integration are needed for those tribes to achieve the maximum use, benefit, and of the value of their own energy resources.

S. 522, Sec. 2604, Resource Regulation Grants: Tribal regulation enforcement is essential, as regulations without enforcement are meaningless. Grants that promote implementation and enforcement of tribal regulations could provide much needed financial assistance to support tribal rangers, inspectors, and judicial experts. On-the-ground capacity critically needs building.

S. 522, Sec. 2605, Indian Tribal Resource Regulation: Like some other tribes, Navajo seeks to engage in a wide range of energy opportunities, including exploration and development, as well as electric generation, transmission and distribution. Mechanisms to streamline tribal leasing, rights of way and business agreements should be broad enough to accommodate energy exploration and development.

S. 522, Sec. 2605 and S. 424, Sec. 103, Streamlining Secretarial Approval: In general, any mechanism that puts tribes in the drivers seat of their own destiny by reducing the involvement of the federal government in tribal decisions is a good thing. A legislative mechanism that relieves tribal transactions of the burden of Secretarial involvement, so long as those transactions comply with pre-approved tribal regulations, is conceptually a very good idea. Such streamlining promotes efficiency, accountability, and self-determination.

Concerns about S. 424 and S. 522, with Recommendations

S. 522, Sec. 2601, Findings: Context is critical to the understanding of why Indian energy production is a problem in need of a legislative solution. While findings are not necessary in legislation, they are helpful to those who must decide today and understand tomorrow why Congress has initiated activity in this area. While S. 424 provides no findings, S. 522 provides much information through its findings about what Indian Country has to offer to the United States domestic energy supply. However, the findings are silent about the extent of poverty, disproportionate cost of household energy, and lack of electricity in tribal communities. Because the stated purpose of these bills is to improve the quality of life within Indian communities through energy development, the Navajo Nation recommends that findings about the tribal quality of life and access to electricity be included.

S. 424, Sec. 101 and S. 522, Sec. 2602, Definitions: S. 522 provides the definition of ten terms, two of which seem curious. "Secretary" is defined as meaning Secretary of Energy, yet much of what the bill subsequently authorizes the "Secretary" to do is within the jurisdiction of the Department of Interior. It is unclear whether this is simply a drafting error, or a calculated shift of responsibilities from one federal department to another. The Navajo Nation recommends that the definition of Secretary be clearly defined and any shift of responsibility from one Department to the other be fully explained. S. 522 also defines "Tribal Consortium" in a manner inconsistent with most federal regulations, which require a tribal consortium to be made up *exclusively* of federally recognized Indian tribes in order to avoid the danger of shill organizations exploiting the membership of tribal straw-men. There are also problems of omission in the definitions listed in S. 522 and S. 424. Neither bill includes "trust responsibility" or "self-determination" in their list of terms defined. The Navajo Nation recommends that these key concepts be defined because they are terms of federal Indian law that are not commonly known, much less understood, by the public at large.

S. 424, Sec. 103(f) and S. 522, Sec. 2605(c), Tribal Regulatory Requirements: Both bills seek to streamline the bureaucratic hurdles that currently confront tribes who wish to enter into leases, business agreements or rights of way for energy related activities. The Navajo Nation supports goals but has the following three concerns:

First, the tribal regulatory requirements, which are identical in each bills, create a menu of criteria that are duplicative of existing federal regulations and therefore unnecessary and burdensome. Under current energy law, tribes may promulgate regulations that are more stringent than federal regulations, but not less. Tribal regulatory requirements promulgated in legislation should have a purpose that is not otherwise currently being met.

Second, both bills authorize infringement of tribal sovereignty by subjecting internal tribal regulations to the public notice and comment process through the federal register.

Third, both bills authorize tribes to enter into energy related leases, provided those leases comply with tribal regulations that have been pre-approved by the Secretary, and are not for a term longer than 30 years. The stipulation of a 30-year term is unexplained and seemingly unnecessary, as the Secretary must approve the tribal regulations one way or another. Further, limiting tribe's ability to do business without Secretarial involvement except in cases of short-term leases undermines the stability needed to attract private sector investment. The lease term should be a decision made by the Tribe, based upon the Tribe's own business judgment.

S. 424, Sec. 104, S. 525, Sec. 2608, Indian Mineral Development Review: Rather than authorizing the agencies to report on themselves, Congress should request the General Accounting Office to report on the accomplishments and failures of the Indian Mineral Development Act of 1982.

S. 522, Sec. 2606, Indian Energy Resource Commission: The make up of the Commission is weighted in such a way as to be antithetical to Indian self-determination. There are several other problems with the make up of this commission.

First, a political appointee is not an objective fact finder as the political appointment itself creates an inherent conflict of interest. A better option would be to have the congressionally chartered think-tank, the National Academies of Science, do the research and publish results. The Committee on Earth Resources at the National Academy is filled with experts whose responsibility it is to provide the federal government with un-biased, cutting edge, scientifically based analysis and recommendations relevant to the supply, delivery, and associated impacts of energy resources.

Second, there are no positions for members to provide expertise in the following areas of concern: community development, environmental health, renewables, land use planning, and sacred site and cultural use protection.

Third, there is no requirement for geographical representation among tribal representatives, which means that all of them could wind up being exclusively from geographic region.

Fourth, limiting tribal representation to elected leaders assures neither the expertise nor stability necessary to make the most of the few Indian seats at the table.

Finally, the power of the Commission is simply alarming. It is quasi-judicial in that it has subpoena power to require testimony and the production of "such books, records, correspondence, memoranda, papers, documents, tapes, and materials as the Commission... considers advisable." (p. 25, line 12) This subpoena power is a direct threat to confidentiality of any and all internal documents and trade secrets related to energy. Ostensibly, such documents could also include tribal, state and private sector memoranda regarding litigation.

S. 424, Sec. 103(f) and S. 522, Sec. 2605 (e)(6), Waiver of Federal Liability: Both bills stipulate a waiver of federal liability, regardless of the degree of managerial control exercised by the federal government in Indian energy development. In U.S. V. Navajo, the Supreme Court said that when Congress enacts a law that aims to enhance self-determination, giving the federal government instead of tribes the lead role in negotiation is directly at odds with self-determination.

While these bills purport to put tribes in the driver seat of decision making, they continue to empower the federal government to act as the traffic cop who is authorized to put its hand out to stop a tribe's car from moving. Both bills ultimately preserve the federal government's final authority over energy leases. Such final authority constitutes the lead role. This scheme, wherein a cabinet Secretary has prescriptive control over decisions regarding Indian energy development, but no subsequent liability, is an abdication of the federal trust responsibility that is patently unfair to tribes.

The Navajo Nation recommends two alternative solutions to rectify this inequity: (1) preserve the federal waiver of liability and remove all legislative language regarding tribal regulation requirements, public notice and comment regarding tribal regulations, public appeals to tribal regulations, and term limits on tribal leases, business agreements and rights of way; or (2) comply with U.S. v. Navajo by spelling out the explicit trust responsibility of each of the Secretaries, at each stage of federal involvement; a criteria to determine a breach of the federal government's trust duties; and the express remedy for damages resulting from such breach.

THE NAVAJO NATION

JOE SHIRLEY, JR.
PRESIDENT

FRANK J. DAYISH, JR.
VICE-PRESIDENT

April 8, 2003

Hon. Senator Ben Nighthorse Campbell
United States Senate
Committee on Indian Affairs
838 Hart Senate Office Bldg.
Washington, D.C. 20510-6450

RE: NAVAJO NATION RESPONSE TO QUESTIONS ON S. 424 AND S. 522

Dear Senator Campbell:

I have received your letter of March 24, 2003 requesting the Navajo Nation's response on three questions pertaining to S. 424, the "Tribal Energy Self-Sufficiency Act" and S.522 the "Native American Energy Development and Self-Determination Act of 2003." I thank the Committee for its cooperation and support with these proposals. Before specifically addressing your questions, I would first like to make it clear that the Navajo Nation certainly supports the purposes of the legislation, as stated in Section 2601 (b), *to assist in the development of Indian energy resources*, and *to further the goal of Indian self-determination through the development of stronger tribal governments and greater tribal economic self-sufficiency*. However, it is not clear to the Navajo Nation at this time that the current proposals will definitely accomplish these ends. The Nation's direct responses to your questions explain our concerns, and are as follows:

Q 1. How would enacting S.522 in its current form detract from or erode tribal sovereignty or decision-making authority when it comes to energy resources?

A: The current draft of S.522 contains many provisions that collectively present a complicated set of issues. Generally speaking, the concept of turning tribal resource management over to tribes while "eliminating" federal oversight would seem to be a very simple infusion of sovereignty into the current statutory and regulatory scheme governing tribal resource development. The Navajo Nation certainly supports this general concept.

However, it is the Navajo Nation's firm position that any modification of the current scheme should result in an overall bureaucratic streamlining, and the removal of unnecessary encumbrances to development. What is considered "unnecessary" should be a cooperative decision made by each tribe and its development partners on a case-by-case basis.

Most importantly, such modification should improve, or at least not negatively impact, relations between the tribal government and its partners, and all of the other "players" involved in tribal resource development, namely, development and financing companies, environmental groups, grass-roots organizations and communities affected by development, and others. Without the full realization of the ultimate goal, which is a much easier and faster process for resource development through increased tribal control over the process, "more" sovereignty will mean nothing.

With this in mind, the Navajo Nation draws your attention to certain provisions of S.522 that are of particular concern.

(1) Requirement of secretarial approval of tribal regulations - Sect.2605(e):

First of all, this requirement will mean a substantial delay in tribal autonomy over resource development. In 2000, the business site leasing laws at 25 U.S.C. Section 415 were amended in a similar manner, but it has taken several years to develop the regulations which have now been adopted by the Navajo Nation but have yet to be approved by the Secretary. The Navajo Nation assumes that this approval process will also be lengthy, as issues raised by the Secretary will undoubtedly necessitate amendments to the version adopted by the Navajo Nation. Moreover, depending on the level of federal control insisted upon by the Secretary, tribal regulations may simply result in a bureaucratic process that is just as onerous as that which it is replacing.

Additionally, tribal parity with state regulatory control would be undermined. Tribes may already promulgate regulations that are more, but not less, stringent than federal regulations governing the same subject matter, and the same is true for states. The following is a list of some of the federal statutes that already control regulations for land use, both state and tribal:

1. National Environmental Policy Act
2. Clean Air Act
3. Clean Water Act
4. Endangered Species Act
5. Federal Land Management and Policy Act
6. National Historic Preservation Act
7. Native American Graves Protection and Repatriation Act
8. Surface Mining Control and Reclamation Act
9. Indian Mineral Leasing Act

Presently under the listed federal statutes, tribal self-determination is embodied in and facilitated by, the statutory provisions treating tribes as states for local regulatory purposes. Thus, the regulatory requirement in S.522 as now drafted, since it would apply *only to tribes*, would actually be a step backward away from self-determination because tribes would be held to additional regulatory approval that states do not have to undergo.

Furthermore, the public notice and comment requirement articulated in Sec. 2605 (c) congressionally authorizes infringement of tribal sovereignty because it would subject tribal regulations, which are inherently internal to the tribe, to the public notice and comment process through the federal register, or some other similar mechanism.

(2) Waiver of United States liability - Section 2605(e)(6):

This waiver could actually undermine the concept of tribal self-determination by making it clear to non-Indian developers that the United States would no longer be held responsible for energy deals gone bad. The companies would likely then see themselves as the sole target of any potential litigation by the tribe, and might insist on more extensive tribal sovereign immunity waivers, dispute resolution in federal courts or federal arbitration arenas, collateral or other security to guarantee financial risk, or other protective measures. As the development framework now stands, any agreement for tribal consent to the Secretary's issuance of, for example, a right-of-way grant, has been a separate contractual agreement between the companies and the tribe standing apart from the property conveyance agreement between the Secretary as Grantor and a company as the Grantee. Thus, companies have felt secure with the idea that cancellation of a right to develop on tribal lands is not unilaterally terminable by the tribe, but must be done by a revocation of the right-of-way or lease by the Secretary.

Furthermore, there is no rationale for the federal liability waiver if the ultimate responsibility for the final regulatory framework controlling the development project still remains with the Secretary, as provided for in Section 2605 (e). Such a scheme would perpetuate the lose-lose paradigm in which tribes have been trapped for too long. Accordingly, why would any tribe want to "opt in?"

Finally, one important question is whether, assuming that the trustee-beneficiary relationship still exists between the United States and tribes, is the waiving of the trustee's liability by the trustee, an act that itself constitutes a violation of the federal trust responsibility to tribes? The Navajo Nation has indeed asserted this position in the past, when requested by the Secretary to waive federal liability before final secretarial approval has been given. A waiver of liability is an issue that directly impacts the very basis of the Indian nations' legal relationship vis-a-vis the United States.

(3) Definition of "Indian Land" as "dependent Indian community" - Section 2602 (4)(B)(iii):

While the Navajo Nation certainly supports the idea of tribal jurisdiction over all "dependent Indian communities" ("DIC") that contain tribal resource development, a DIC is a legal term-of-art that generally must be factually determined through litigation. Thus, the jurisdictional boundaries of a proposed project will immediately present legal issues that will likely require litigation to resolve.

(4) Action by Secretary in event of alleged tribal non-compliance with regulations - Section 2065(e)(7):

As far as tribal sovereignty is concerned, any complaints of tribal non-compliance with the regulations should be heard, not by the Secretary, but in the Indian tribal courts, with review by federal courts after exhaustion of tribal remedies, as is now generally the

case in disputes. This legislation should expressly limit the jurisdiction of federal courts to a review of *the federal legal issues only*, so as to assure judicial deference to the tribal court's rulings on the facts.

(5) Effect on other laws - Section 2065 (g):

Because of the nature of the other laws mentioned that govern rights-of-way grants, leases, mining control and reclamation, and other environmental requirements, the Navajo Nation cannot see how the proposed legislation can be enacted without containing amendments to these laws. These laws generally create a property relationship between the federal government and the non-Indian developer, and thus would have to be amended to reflect the modification, or elimination, of this relationship. In short, S.522 must be fully examined against all other related statutory provisions, so that contradictory provisions can be reconciled..

Q 2. What are the core reasons for the lack of electricity in 37% of Navajo homes?

A: There are two basic reasons for the continuing lack of electricity for many Navajo households. First is the size of Navajoland and the severe lack of capital for electrical line extensions to many homes located far away from existing powerline grids. Navajoland covers some 27,000,000 acres, and the number of customers per mile of distribution is something like 6, compared to literally hundreds in an urban area off the reservation. Thus, the economics do not support the transmission and distribution infrastructure to provide power to those who are in sore need of it. Providing utility services is highly capital intensive and requires large amounts of capital funds to provide facilities to distribute electricity. Funding for construction and extension of existing powerlines comes from various sources. The primary source of funding comes as loans from the Rural Utilities Services of the Department of Agriculture and from the National Rural Utilities Cooperative Finance Corporation. In addition, the Navajo Tribal Utility Authority (NTUA) provides contribution-in-aid of construction for electrical line extensions. In concert, the Navajo Nation provides to NTUA Community Development Block Grants and Community Improvement Program funds for capital powerline construction. These funds generally are for clustered housing units that are determined economically feasible.

Additionally, because of exploitative federal actions in the 1950's and 1960's undertaken to encourage and allow population growth in major southwest cities, most of the existing major transmission and distribution lines are owned by non-Indian companies, and the rights-of-way for these lines also do not lie in tribal hands. These two factors have combined to make it very difficult for the legal aspects of the business relationships between the tribe and entities involved to be satisfactorily arranged.

For example, the Secretary granted the Western Area Power Administration a perpetual right-of-way for a transmission line to carry electricity across Navajoland to supply markets in southern California and the Phoenix area. Similarly, construction of the Central Arizona Project to meet the water demands of a growing southern Arizona populace was a key factor in the exploitation of the Navajo Nation's coal and water resources. Because of this ownership of most of the existing facilities by non-Indians, some federal and some private, the needed residential power lines cannot be extended to Navajo homes without the cooperation of these non-Indian entities. The Navajo Nation has yet to secure

such cooperation from several key players, and would greatly appreciate the Committee's assistance in this matter.

To rectify these past injustices, perhaps some compensation to the Navajo Nation from the federal government or the ultimate electricity customers could be obtained, with the monies specifically dedicated to rural electrification projects on Navajoland. Or, perhaps Congress could facilitate the takeover of all existing facilities by the tribe, so that extensions could be made by NTUA without having to deal in messy jurisdictional issues with the uncooperative non-Indian companies.

Q 3. What advice would the Navajo Nation offer to Tribes who are just starting out on the energy development path; how does a tribe make certain that it gets the full benefit of its resources and its decisions to develop its resources?

A: First, tribes must be certain that local communities that will be impacted by proposed development be involved in the tribe's decision-making process. Benefits must go directly to these communities in the form of infrastructure, financial assistance, and jobs. Also, the environmental, traditional, and religious concerns of the residents must be adequately addressed.

Just as importantly, the type of development project must focus not only on the short term financial gain to the parties, but on long-term benefits that can be achieved through a "sustainable resource development" model. In other words, the project must provide for a mechanism to somehow continue the economic benefits that flow from the project after the tribal resource is depleted. Without such planning, tribal economies will inevitably experience the "boom and bust" cycle that characterizes many resource development scenarios in the Third World.

As a final comment, for now, with respect to S.522 or any proposed legislation that purports to strengthen tribal governments and self-sufficiency, it has been the Navajo Nation's experience, as it has unfortunately been with all of Indian Country, that the failure to include in these old agreements the proper explicit language regarding reserved tribal governmental authority over non-Indians (what the Supreme Court has dubbed "reserved gatekeeping rights") has been interpreted by the Supreme Court to be a "giving up" of tribal jurisdiction over many of these projects.

Because of this disingenuous position of the Supreme Court, the Navajo Nation has found it necessary to place such gatekeeping language in agreements that have been negotiated subsequent to those decisions of the Court that have severely eroded the status of Indian nations as legitimate governmental bodies. However, given the language of some of these Supreme Court cases, it has been very difficult to get the cooperation of potential non-Indian partners in terms of their consenting to the Navajo Nation's civil jurisdiction and treating the tribe as a legitimate government with authority over our own territory. They have generally been extremely reluctant to sign away their rights to assert the standard "the tribe has no jurisdiction to legislate or adjudicate because we are a non-Indian" argument. It is our hope that we have the Committee's support in addressing this dismaying development in federal common law with this Senate bill or any others.

Thank you for your consideration. The Navajo Nation is committed to the ongoing efforts at drafting appropriate legislation to address the two laudable goals of S.522 *to assist in the development of Indian energy resources*, and *to further the goal of Indian self-determination through the development of stronger tribal governments and greater tribal economic self-sufficiency*. If you have any questions, please direct them to the Navajo Nation Washington Office, at (202) 775-0393.

Sincerely,

THE NAVAJO NATION

Joe Shirley, Jr., President

Statement of Vernon Hill
Chairman of the Eastern Shoshone Business Council of the
Wind River Indian Reservation

Before the United States Senate
Committee on Indian Affairs

On
Legislation Relating to Indian Energy:
S. 424, the Tribal Energy Self-Sufficiency Act and
S. 522, the Native American Energy Development and Self-Determination Act of 2003

March 19, 2003

INTRODUCTION

Good afternoon Mr. Chairman and Mr. Vice-Chairman and members of the Committee. For the record, my name is Vernon Hill. I am Chairman of the Eastern Shoshone Business Council of the Wind River Reservation in Wyoming. I am pleased to be with you today to testify on pending legislation relating to Indian energy development, namely S. 424, entitled the Tribal Energy Self-Sufficiency Act and S. 522, the Native American Energy and Self-Determination Act of 2003. I am presenting this statement on behalf of both Eastern Shoshone Tribe and the Northern Arapaho Tribe, both share the Wind River Reservation. Our Tribes support provisions in both S. 424 and S. 522, and we also have concerns with provisions in these proposals. Before discussing the specifics of our Tribes' position on these bills, my statement will first provide information regarding our Tribal governmental operations as well as the current and potential energy production on the Wind River Indian Reservation.

BACKGROUND OF THE RESERVATION AND ECONOMY

The Wind River Reservation was established by the Treaty of July 3, 1868 and is the only Indian Reservation in Wyoming. The Reservation is located in central Wyoming and is named after the scenic Wind River Canyon. The Reservation is an area about 3,500 square miles just east of the Continental Divide and is bordered roughly on the north by the Owl Creek Mountains which join the Rocky Mountains and east to Wind River Canyon. The Bridger and Shoshone National Forests and the Wind River Mountains serve as a border for the western segment. From these areas, streams flow south and east into the foothills and plains which constitute two-thirds of the reservation.

The Eastern Shoshone Tribe shares the Reservation with the Northern Arapaho Tribe which encompasses over 2.2 million acres with significant quantities of oil and gas reserves. The Reservation has about 23,000 residents, over 50% of whom are Tribal members whose lives are directly impacted by the development of the Tribes' mineral resources.

The Tribes on the Wind River Reservation generate nearly $180 million in economic activity primarily from oil and gas production, and 1600 jobs within Fremont County. Some private businesses and tourism also contribute to the Reservation's economy. Many of the Tribal members work on expansive ranches and farms, including the Eastern Shoshone Ranch as agriculture is a big part of the economy of the people. The Bureau of Indian Affairs, Indian Health Service and the Tribal government are the primary employers for many tribal members. The Reservation has the highest unemployment rates in the State of Wyoming and Fremont County (where 99.5 percent of the Tribal members reside) has one of the highest drug and alcohol abuse problems in the Nation. Unfortunately, many of our Tribal members as well as other Reservation residents must leave the area in order to locate work.

RELIANCE ON REVENUE FROM OIL AND GAS PRODUCTION

Clearly, the production of oil and gas reserves on the Wind River Reservation is the primary source of revenue for the Tribes. The Tribes have always undertaken a balanced approach to use our natural resources recognizing the importance and quality of our wildlife and grazing use on the same lands where we develop our oil and gas reserves. This production is not only important in the region, but also hold national significance: there are currently 852 producing wells on the Reservation; the production of natural gas from the Reservation represents 7% of all gas royalties paid from production on American Indian Reservation in the Lower 48 States, and the production of oil from the Reservation represents 21% of all oil royalties paid from production on American Indian Reservation.

The Tribes impose a severance tax of 8% the revenue of which is used for education, law enforcement, environmental protection, social services, fire protection, wildlife management and other governmental services. The revenue from the Tribes' oil and gas royalties and taxes is responsible for over 90% of the Tribes' governmental revenue. Approximately 85% of the royalty income is paid out to Tribal members on a monthly basis and is used for food, heat, electricity. For some Tribal members, this is their only income.

The development of energy resources on the Wind River Reservation is inhibited by the State of Wyoming's imposition and collection of a 6% severance tax, a 7.5% ad valorem tax and a .5% conservation tax. As a result of these State taxes imposed on top of the Tribal tax, production of our oil and gas reserves is subject to an extreme total tax burden of 22%, thereby stifling production. Moreover, of the 14% (approximately $12 million) of the revenue stream drawn off the Reservation by State taxes 9, under 65% (approximately $7.2 million) of those funds are returned to the Reservation in the form of services. In addition, Fremont County collects $14

million from the ad valorem tax assessment and the Tribes receive less than half of this back in programs and services. To exacerbate this issue, the school district boundaries of the Reservation are gerrymandered so that most of the valuation from the Reservation goes to non-Indian school districts. The Tribes have made progress in working with the State Legislature in addressing some of these issues, and bring this realty to Congress attention to demonstrate the daily and severe challenges to developing our nonrenewable resources.

For these reasons, the Tribes support federal tax incentives that would off-set the impact of the dual taxation burdens on Indian oil and gas production. In the 107th Congress, we supported S. 1106 introduced by Senator Domenici to establish a federal tax credit based on the volume of production of oil and gas from Indian lands. This type of a credit would make production of our reserves more competitive and increase the return on our nonrenewable trust resources. By generating significant new revenue to tribal mineral owners, in the form of tax credits, royalties, and tribal taxes, tax incentives like the one embodied in Senator Domenici's proposal, would stimulate tribal economies and increase the overall domestic oil and gas supplies, thereby reducing our Nation's dependency on foreign sources of energy. Although neither S. 424 nor S. 522 contains tax provisions, the Tribes believe than any comprehensive energy legislation must include meaningful tax incentives to encourage, promote and foster energy production on Indian lands. In addition, the Tribes own fee lands that contain energy potential, these bills should provide some preference or direction to the Secretary of the Interior in processing fee to trust applications for energy development purposes.

COMMENTS ON S. 424 & S. 522

Given our Tribes' reliance on oil and gas production, this statement on S. 424 and S. 522 will primarily focus on provisions from the perspective of oil and gas reserves.

Congressional Findings and Definitions

Neither the 1992 Energy Act nor S. 424 contain congressional findings. S. 522 includes section on congressional findings which sets forth the background and factual information regarding energy resources on Indian lands. Accordingly, more than 10% of all energy reserves in the United States is from Indian lands:

- 30% of known coal deposits,
- 5% of known onshore oil deposits, and
- 10% of known onshore natural gas deposits.

According to S. 522's findings, the Department of the Interior (DOI) estimates that only 25% of the oil and less than 20% of all natural gas reserves on Indian lands have been developed, and that additional development of these reserves would benefit tribal community development as well as reducing the United States' dependence on foreign sources of energy.

While the findings in S. 522 powerfully illustrate the untapped energy potential on Indian lands, the bill should also include a statement of the legal and economic barriers that have limited the

development of tribal energy resources, namely dual taxation burdens as well as transactional and other regulatory costs associated with business development on remote reservation lands.

With respect to the definitions section, in S. 522 defines "Tribal Consortium" as an organization that consists of at 3 entities, 1 of which is an Indian tribe. This definition is somewhat vague, confusing and may need further clarification. Providing a more concrete definition is important given the enormous resources and access to programs that tribal consortia will be eligible to receive.

Both S. 424 and S. 522 exclude from their definition sections the meaning of an "Indian energy resource." It may be advisable to include a definition of Indian energy resources to tighten the bill.

Comprehensive Indian Energy Policy and Program Office in DOE

Our Tribes support the provisions in both S. 424 and S. 522 which establish and enhance Indian energy policy and programs within the Department of the Energy, with the accompanying authorization of appropriations for such programs. S. 424 would formally establish the Office of Indian Energy Policy and Programs (OIEPP) within the Department of Energy (DOE), and therefore subsequent Energy Secretaries would be bound by DOE's organizational structure and would not have the discretion to eliminate the office. For these reasons, our Tribes support the approach embodied in S. 424 regarding the establishment of the OIEPP.

With respect to the grant programs supporting the development of Indian energy resources, our Tribes endorse the approach in S. 424 which establishes criteria for the awarding of grants, subject the specific recommendations outlined below.

Given the vast acreage of the Wind River Reservation, like other large land-based tribes, and the Tribes' service population, we believe that the inclusion of criteria for competitive grants may be advisable. S. 424 assigns priority to Indian tribes whose application demonstrates "inadequate electric service" as determined by the discretion of the Director. Our Tribes agree with the designation of this priority but believe it should be clarified to reflect the housing demand and the lack of affordable energy to serve this need. Moreover, due to the specific concerns regarding the location of our Tribes on a single Indian Reservation, our Tribes recommend changes in the bill to reflect this circumstance.

The loan guarantees in S. 424 would be limited to an aggregate amount of $2 million, and not to exceed more than 90% of the unpaid principal and interest due on any loan made to an Indian tribe for energy development and for transmission and delivery mechanisms for energy produced on Indian lands. Given the great demand for access to capital for the development of Indian energy projects, we recommend that the guarantee amount be increased to $5 million.

In light of the vast undeveloped energy resources on the Wind River Reservation, S. 424's provision which requires examining the financial or other assets available to an Indian tribe from ***any*** source could arguably include these untapped resources. Therefore, our Tribes oppose the

inclusion of this factor in deciding whether to award grants to Indian tribes. This provision should either be removed or exclude from its definition any undeveloped natural resource on an Indian reservation. Indeed, it would be counter-intuitive for Congress to pursue legislation focusing on development of energy resources on Indian reservations while at the same time penalize tribes for owning undeveloped resources. Our Tribes also support S. 522's provisions strengthening enforcement of tribal laws. *See* Section 2604 in S. 522 entitled "Indian Tribal Resource Regulation provisions."

Streamlining the Reguatory Process for Approval of Leases and Rights-Of-Way

The centerpiece for both S. 424 and S. 522 is the "streamlining" of the approval processes for energy leases and rights-of-way related to energy development on Indian lands. Under current law, the Secretary of the Interior is required to approve each of these agreements which convey and interest or otherwise encumber an Indian tribe's energy and natural resources. Both bills propose a framework wherein tribal governments would have the option to promulgate regulations, under tribal law and in accordance with specific conditions or requirements set forth in the bills, and submit these regulations for approval by the Secretary of the Interior. Once approved, the tribal government would have the primary governmental responsibility in approving energy development related leases and rights-of-way without having to submit each proposed agreement to the Secretary for approval. If an Indian tribe opts to develop tribal regulations and secure secretarial approval of them, both bills would completely release the United States from any liability associated with leases or rights-of-way executed under these regulations.

This streamlining proposal has been discussed over the past few years and has gained the support of the Council of Energy Resource Tribes (CERT), of which both Eastern Shoshone and the Northern Arapaho Tribes are founding members. Other energy producing Indian tribes also support this streamlining proposal. However, with regard to our experience in the oil and gas production arena, reform of the regulatory process in itself will not provide meaningful incentives to increase production of our oil and gas reserves. This streamlining could benefit potential wind energy production on the Wind River Reservation, as a secondary energy resource.

Our Tribes are concerned that the streamlining proposals embodied in both bills would require participating Indian tribes to absorb all of the costs and liability associated with approving business leases and rights-of-way. Many direct-service tribes may not be prepared to assume these responsibilities and costs. Moreover, this approach essentially removes the federal government from exercising its trust responsibilities over energy resource development. For these reasons, our Tribes do not believe a streamlining of the regulatory processes for oil and gas production is warranted. The current federal regime for oil and gas leasing places responsibilities on the Bureau of Indian Affairs, Bureau of Land Management and the Minerals Management Service.

From our experience, our Tribes cannot, at this point in time, support an approach that would release these federal agencies from their responsibilities in the valuation, leasing, accounting and

distribution of royalties and other payments with respect to oil and gas production on the Wind River Reservation. Our concerns are limited to oil and gas production on the Wind River Reservation. We respect the position of CERT and other energy tribes who endorse a streamlining approach for other energy development purposes.

Accordingly, our Tribes offer the following specific comments on the proposed streamlining process, discussed by category:

1. ***Secretarial Approval of Tribal Regulations:***

Both bills set forth criteria for the Secretary to approve regulations issued under tribal law and would require the Secretary to either approve or disapprove the regulations. Under S. 424, the Secretary would be authorized to approve tribal regulations, within ***270 days*** upon submission, if she determines that such regulations:

- Are comprehensive in nature;
- Include provisions securing necessary information from the applicant, address the term of any conveyance, any amendments and renewals, the consideration for the lease or right-of-way, any technical and environmental requirements, the identification of final approval authority and public notification of final approvals;
- Establish a process for consultation with any affected States with respect to "potential" off-reservation impact associated with a lease or right-of-way proposed to be granted.

Similarly, S. 522 would require the Secretary to either approve or disapprove tribal regulations within ***120 days*** upon submission by a tribe. The Secretary would be authorized to approve tribal regulations if she determines that such regulations:

- Ensure the acquisition of necessary information from the applicant;
- Address the term of the lease or right-of-way;
- Address amendment and renewals;
- Include the consideration for the lease or right-of-way;
- Address technical or other relevant requirements;
- Ensure compliance with all applicable environmental laws;
- Identify final approval authority;
- Provide for public notification of final approvals;
- Establish a process for consultation with any affected States concerning potential off-reservation impacts associated with the lease or right-of-way.

The bills should be amended to require a consultation process with the affected States concerning "direct or adverse" off-reservation impacts associated with the lease or right-of-way. A higher threshold should be adopted to weed out any unreasonable concerns that may be inserted into the process.

2. ***Specific Requirements Regarding Tribal Environmental Review Process:***

Both bills set forth specific requirements an Indian tribe would have to meet in establishing an environmental review process. This specific process would be required to be included in all

tribal regulations submitted for secretarial approval. Under both bills, a tribal environmental review process must include:

- An identification and evaluation of all significant environmental impacts of the proposed action as compared to a no action alternative;
- Identification of proposed mitigation;
- A process for ensuring that the public is informed of and has an opportunity to comment on the proposed action prior to tribal approval of the lease or right-of-way; and
- Sufficient administrative support and technical capability to carry out the environmental review process.

The bills should be amended to provide Indian tribes adequate resources to assume these comprehensive federal responsibilities. Providing these resources is consistent with the federal trust responsibility and comports with the longstanding policies supporting and promoting tribal self-determination and tribal energy self-sufficiency.

3. ***Timeframe and Standards for Secretarial Approval or Disapproval of Tribal Regulations:***

S. 424 would require the Secretary to act, within 270 days,[1] of a tribe's submission of its regulations for approval. S. 522 provides that the Secretary shall approve or disapprove regulations submitted by an Indian tribe for approval not later than 120 days, or by a later date agreed to by the secretary and the Indian tribe. Both bills include a provision authorizing the Secretary to provide notice and opportunity for public comment on the tribal regulations submitted for approval. If the Secretary disapproves the regulations, she would be required to:

- Notify the Indian tribe in writing of the basis for the disapproval;
- Identify what changes or other actions are necessary to address her concerns; and
- While implied in S. 424, S. 522 contains a provision which requires the Secretary to provide the Indian tribe with an opportunity to revise and resubmit the regulations.

With respect to regulations that are approved by the Secretary, a tribe would be required to:

- Submit to the Secretary a copy of the lease or right-of-way executed under the regulations, including all amendments to and renewals of the document; and
- Documentation of the payments paid directly to the tribe in accordance with the instrument.[2]

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[1] This section provides the Secretary with the authority to extend this deadline "after consultation with the Indian tribe."

[2] This provision specifically states that such documentation is needed "to enable the Secretary to discharge the trust responsibility of the United States as appropriate under applicable law." Given the recent Supreme Court ruling in *United States v. Navajo Nation*, this provision is essentially meaningless, without further explanation. This is especially glaring given other language in this section which shields the United States from any liability in association with leases or rights-of-way executed in accordance with tribal regulations.

As previously highlighted, these section set forth a lengthy and costly approval regime which would require tribes to meet with specificity comprehensive environmental requirements and to absorb the costs of complying with these requirements. Both bills contain an express provision shielding the United States from any liability for any loss sustained by any party, including any Indian tribe or member of an Indian tribe, to a lease executed in accordance with duly approved tribal regulations. The provision in both bills which requires the submission of documentation of payments made directly to an Indian Tribe in order "to enable the Secretary to discharge the trust responsibility of the United States as appropriate under applicable law"[3] is confusing and makes no sense given the overall framework which essentially removes the federal government from any direct involvement or for any liability relating to agreements or rights-of-way executed under tribal regulations.

4. Secretarial Review of a Tribe's Compliance with Duly-Approved Regulations:

Both bills contain sections that permit the Secretary to review whether an Indian tribe is in compliance with tribal regulations authorized by the legislation. S. 424 would allow an "***interested party***"[4] after exhaustion of tribal remedies, to timely submit to the Secretary of the Interior a petition for review of whether an Indian tribe has complied with any tribal regulations duly approved under this section. By contrast, S. 522 would allow ***any person*** to petition the Secretary to review a tribe's compliance with tribal regulations approved under this section. S. 522 would not require exhaustion of tribal remedies prior to filing the petition for review.

S. 424 would require the Secretary to conduct a review within 60 days of submission of the petition, while S. 522 would require to act within 90 days of submission of the petition. Under both bills, if Secretary determines that the tribe has violated regulations, the Secretary could take the following action(s):

- Rescind or suspend the lease or right or way until the violation is cured; and
- Rescind approval of the tribal regulations and reassume responsibility for approval of leases or rights-of-way associated with the energy pipeline or distribution line at issue.

If the Secretary seeks to compel compliance with tribal regulations, the Secretary shall:

- Provide the Indian tribe with written notice of the violation with the written determination describing the manner in which the tribal regulations have been violated; and
- Prior to taking an action to remedy the alleged violation, provide the tribe a hearing and a "reasonable opportunity" to attain compliance with the regulations; and
- The tribe would have the ability to appeal the Secretary's determination "as provided by regulations promulgated by the Secretary."

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[3] *See* S. 424, Section 103 (f)(5)(B) and S.522, Section 2605 (e)(5)(B).

[4] An "interested party" is defined as a State or other person the interests of which could be adversely affected by a decision of an Indian tribe to grant a lease or right-of-way in accordance with this section. This definition appears to be very broad in nature and could possibly allow parties with very little connection to an agreement the standing to petition the Secretary of the Interior for relief.

Our Tribes support S. 424's provision which requires exhaustion of tribal remedies prior to petitioning for secretarial review of an Indian tribe's compliance with its regulations. We also support S. 424's limitation that only "interested parties" should be allowed to seek secretarial review of a tribe's compliance with tribal regulations. Both bills should also strengthen and make clear that the Indian tribal government is the undisputed primary governmental authority to regulate and govern all persons and entities in the context of duly approved tribal regulations, and further emphasize all persons and entities are subject to tribal jurisdiction and laws of the tribe. It may be advisable to include provisions that address the fact that two separate tribes occupy a single Indian reservation.

Other miscellaneous provisions in this section of both bills include:

- Waiving the contracting requirements of 25 U.S.C. § 81 where leases or rights-of-way have been the subject of an environmental review process;
- Providing that nothing in this section modifies or otherwise affects the applicability of any provision in the Indian Mineral Leasing Act of 1938, the Indian Mineral Development Act of 1982 and the Surface Mining Control and Reclamation Act of 1977 or any environmental laws of the United States.

The scope and depth of these laws and their interrelationships with the comprehensive tribal regulations approval regime set forth in both S. 424 and S. 522 merit additional review and analysis, not contained in this statement.

OTHER PROVISIONS

Summary

Both bills contain provisions designed to encourage energy efficiency and assistance to low income consumers. S. 522 focuses on energy efficiency in housing. Both bills direct the Secretary of HUD to work with Indian tribes to provide nonprofit and community organization technical assistance in using energy-saving technologies. Our Tribes support an approach that would allow funding to flow directly to the tribal government.

S. 424 would create a competitive grant program for local governments, private, nonprofit community development organizations, and tribal economic development entities. S. 424 contains a specific title on Renewable Energy and Rural Construction Grants and designate Indian tribes eligible for funding from existing DOE programs. The Wind River Reservation has wind energy potential and therefore, our Tribes support the inclusion of these proposals in an comprehensive Indian energy bill.

S. 522 would require the Secretary to submit a report to Congress after two years following enactment of the legislation, and every two years thereafter, on energy development potential on Indian land which identifies barriers and recommendations to remove such barriers. S. 522 also includes, like the 1992 Energy Act, the establishment of an Indian Energy Resource Commission which would be required to report on proposal and recommendations regarding energy development on Indian lands.

In the past 11 years since the passage of the 1992 Energy Policy Act, there have been many studies and assessments of energy needs and potential on Indian lands. A wholesale adoption of all of the studies called for in both S. 424 and S. 522 may be unnecessary and redundant. Consequently, the establishment of a 20-member energy commission and the resources necessary to fund and staff this commission may not be a priority for addressing energy development on Indian lands. Therefore, our Tribes do not support the establishment and funding of this commission-- resources could be used for other priorities.

Finally, as discussed previously in this statement, both S. 424 and S. 522 lack tax incentives for energy development on Indian lands. Our Tribes have firsthand knowledge of the fact that tax incentives indeed stimulate activity on reservation. Currently, the oil and gas production on the Wind River Reservation suffers from triple taxation burdens. Support for a tax incentive, like the one embodied in S. 1106 introduced by Senator Domenici in the 107th Congress, would provide needed incentives to encourage energy development on the Wind River Reservation. Therefore, our Tribes believe is it necessary to apprise the Committee of our concerns and energy experience and urge the Committee to support the inclusion in a comprehensive Indian energy bill of tax provisions that provide meaningful incentives for development of energy resources on Indian lands.

CONCLUSION

In closing, on behalf of the Eastern Shoshone Tribe and the Northern Arapaho Tribe, I would like to commend Chairman Campbell, Vice-Chairman Inouye, Senator Bingaman, Senator Domenici and the other sponsors for their hard work in developing these bills. Strong and persistent congressional focus on Indian energy development is needed to ensure the enactment of a comprehensive Indian energy measure.

Thank you again for the opportunity to testify before the committee on these critically important matters.

Statement

Of

A. David Lester, Executive Director
Council of Energy Resource Tribes

On behalf of

Darrell Martin, President
Council of Energy Resource Tribes

Before the

United States Senate Committee on Indian Affairs

On S. 424 and S. 522
Indian Energy Legislation

Wednesday, March 19, 2003
Senate Russell Building 485

Good afternoon, Mr. Chairman, Mr. Vice Chairman and Members of the Indian Affairs Committee, I am very pleased to have the opportunity to testify before the Committee today.

My name is A. David Lester and I am Executive Director of the Council of Energy Resource Tribes. Accompanying me today is Victor Roubidoux, Treasurer of the Iowa Tribe of Oklahoma and a member of the CERT Board of Directors. At this time, I would like to defer to Mr. Roubidoux who will describe the CERT organization.

Again, thank you Mr. Chairman for the opportunity to speak today on behalf of CERT Chairman Darrell Martin, who could not join us today, and all of the 53 CERT member tribes. Mr. Martin is also Vice Chairman of the Fort Belknap Tribe of Montana. CERT wants to thank the Committee for its interest and commitment to enactment of legislation to pave the way for Indian tribes to develop their vast renewable and non- renewable energy resources. Our single hope is that this development can occur in a manner that does not result in a repeat of the past when Indian owned resources were exploited by non-Indians and some in government.

We think Indian resource development will be a win-win endeavor. It benefits tribes in isolated areas that have resources and it benefits America by lessening its dependence on foreign energy supplies. Our philosophy is that the tribes know best how and at what pace to develop their own resources. Unfortunately, they do not always have the needed tools to achieve their development goals. This is why we applaud the drafters of both S. 424 and S. 522, which provide grants, loans and needed technical assistance to tribal governments. CERT is particularly pleased with the findings language of the new section 2601 in S. 522. These

findings express the special legal and political relationship between the United States and Indian tribal governments and recognize the role tribal energy development can have in helping to secure United States independence from foreign energy supplies.

As you may know, CERT has been very busy preparing for its large annual sustainability conference scheduled for mid-April and thus we have had less time that we would like to review and compare the provisions of S. 424 and S. 522. With that caveat, we would like to make some preliminary comments on the two bills. We are of course ready and willing to work closely with Committee staff to come up with a blended bill that will foster energy development on Indian lands.

First, CERT urgently requests that the Comprehensive Indian Energy Program of Title I of S. 424 be enacted into law. This Title establishes an Office of Indian Energy Policy and Programs within the Energy Department to oversee the development of tribal energy on Indian lands. The Office would provide competitive grants and loans to tribes for energy programs, acquisition of supplies, services and facility, all aspects of electricity development. The bill authorizes $20 million per year for 7 years for grants and up to $2 billion in loan guarantees. We believe the similar provisions in section 2603 of S. 522 should be substituted with the provisions of S. 424.

The critical need in Indian country is capacity building. In order for tribes to participate as an equal partner with energy companies, they first need financial and technical resources to insure they have to tools to bring to the table. Open markets work best where there is symmetry in capacity among the players. The history of tribal economic development shows that the tables have been tipped in favor of the companies. There will never be a level playing field if the industry has all the cards. We must never see a repeat the tremendous loss suffered by the Navajo Nation because the other side had insider knowledge that was kept from the Nation by its own trustee.

Both S. 522 and S. 424 contain provisions that permit tribes to site energy facilities and projects without securing secretarial approval of each and every transaction. These activities will be conducted under regulations promulgated by tribal governments and approved by the Secretary of the Interior. S. 522 seems to give authority for regulation approval to the Secretary of Energy. We would of course prefer that the Secretary of the Interior retain the trust responsibility for development of the regulations.

S. 424 provides these siting provisions for *electricity* production, transmission, and distribution facilities. S. 522 extends the provisions to other *non-renewable energy* development such as oil, gas and coal. We prefer the S. 424 approach. However we support the review of Indian mineral development called for by section 2608 of S. 522 and section 104 of S. 424. We have a long history of Indian mineral development of oil, coal and gas but very little history for this development of electricity on tribal lands. That is why we need a fresh start for electricity that is provided by the siting provisions. We would prefer to go slower with respect to changes in siting requirements for oil, coal and gas development, at least until the review is completed.

One of our major concerns is the process that will be used to challenge tribal decisions made under their own regulations. These regulations provided for in both bills have a built-in extensive environmental review process that involves public notice and comment. Our view is that the right to appeal should be very limited and that any overriding of tribal decisions should be based on clear findings of failure of the tribe to follow its own rules. S. 424 provides that only an "interested party" (a State or a person whose interests may be adversely affected) can petition the Secretary when a tribe allegedly violates its own siting regulations. The new section 2605 of S. 522 contains similar requirements but appear to allow *any person after exhaustion of tribal remedies,* with or without a nexus to the project, to petition the Secretary for review of tribal compliance with its own regulations. We believe this could cause great mischief for Indian energy development and urge the Committee to revisit this language.

A special concern we have about S. 522 is that it basically rewrites the existing section 26 of the 1992 Energy Policy Act. Most of the "Indian Energy Act" has regrettably never been implemented. It seems therefore somewhat pointless to rewrite provisions that there is no support for pursuing. For example, the Indian Energy Resource Commission was authorized in 1992 but has never been established. Unless there is a clear commitment from this Administration that it will support the Commission, then it seems useless to re-enact the provision.

We are pleased with the direction in the new section 2607 of S. 522 to require the Secretary of HUD to give technical assistance to tribes and tribal housing entities on energy-saving technologies. We applaud this effort to promote energy efficiency.

CERT supports the provision in S. 424 to provide direction to the federal power marketing administrations to use tribal power allocations to provide electricity to Indian lands and to purchase power from Indian tribes. The power allocation report is overdue and we hope that it will be retained in any final bill reported by this Committee and enacted by the Congress.

Title II of S. 424 would include tribal governments in the renewable energy production incentive program is critical and should be retained in the final bill. It is not included in S. 522.

Again, CERT is delighted that the Indian Affairs Committee is focusing early attention in the 108th Congress on Indian energy development needs. We look forward to working closely with the Committee and staff to develop a bill that enjoys wide support in Indian country and in the Congress. Thank you.

Testimony of Victor Roubidoux
Tribal Treasurer of the Iowa Tribe of Oklahoma
&
Board of Directors of the Council of Energy Resource Tribes

Before the Senate Indian Affairs Committee
U.S. Senate

Full Committee Hearing on S. 424, the "Tribal Energy Self-Sufficiency Act" and S.522, the "Native American Energy Development and Self Determination Act of 2003"

Washington, D.C.
March 19, 2003

Good afternoon, Chairman of the Indian Affairs Committee, I would like to thank the Committee for holding this hearing to give Tribes the opportunity to testify on their energy visions and plans for the future. My name is Victor Roubidoux and I am a Board Member of the Council of Energy Resource Tribes and also the Tribal Treasurer for the Iowa Tribe of Oklahoma. I am pleased to be here and offer brief comments regarding the importance of the proposed Indian Energy legislation.

The Iowa Tribe of Oklahoma is working with CERT for the advancement of all Tribes toward the National Tribal Energy Vision adopted by CERT Tribes, which states, "each sovereign Indian Tribe will have sufficient and reliable supply of electricity at reasonable costs to support its social and economic well-being".

The Iowa Tribe and CERT strongly support S.424 and S. 522 and urge their enactment.

Each Tribe is distinct in their energy development to achieve their energy vision. The Iowa energy plan focuses on three areas; energy development of our tribal lands, energy procurement opportunities with our tribally owned energy marketing company and energy efficiency and a tribal member energy program.

The legislation to be considered will provide assistance for capacity building and to bring down federal policy, regulatory and financial barriers for Tribes to become full market participants in the electricity marketplace.

For my Tribe's projects we would directly benefit by the grants to further evaluate a hybrid (wind and natural gas) distributive generation project to serve the load of our tribal headquarters and a potential generation project on our tribal trust lands. Also our tribally owned energy marketing company, BKJ Energy has partnered with Syntroleum, an Oklahoma energy research company. BKJ Energy will provide natural gas feedstock to a Gas-to-Liquid (GTL) Production and Demonstration Project under the DOE's Ultra Clean Fuels Program. The pilot demonstration facility at the Port of Catoosa near Tulsa, Oklahoma is under construction and production of the clean diesel is expected this summer. This business partnership aligns itself

with the Tribe's overall environmental policy. Partnering to produce a clean and efficient fuel is a cornerstone in the philosophy of the Iowas. We strongly urge the creation of the Office of Indian Energy, Policy and Programs at the DOE. This office would be essential to promote tribal sovereignty and economic self-sufficiency and move these proposals into reality.

Thank you Mr. Chairman for your time and attention on this important legislation.

UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS

HEARING ON
INDIAN ENERGY LEGISLATION
S. 424 and S. 522
Washington D.C.
March 19, 2003

Testimony of:
Robert P. Gough, Secretary
INTERTRIBAL COUP
P.O. Box 25
Rosebud, South Dakota 57570

On Behalf of
INTERTRIBAL COUP ~ Council On Utility Policy
and
The Rosebud Sioux Tribe Utility Commission

Introduction:

Hello, my name is Bob Gough, and I am here today on behalf of the Intertribal Council On Utility Policy (COUP) and of the Rosebud Sioux Tribe Utility Commission. Both are headquartered on Rosebud Sioux Indian Reservation in South Dakota. Intertribal COUP represents the majority of the tribes based in the Northern Great Plains and has been one of the leaders in the area of Indian renewable energy policy over the last decade. We have worked closely with the National Congress of American Indians and are one of the founding members of the Inter-Tribal Energy Network (ITEN), a group of regionally- based intertribal organizations concerned with a variety of energy issues.

Thank you Chairman NightHorse Campbell, and Senator Inouye, on behalf of all the American Indians for your leadership in holding this hearing today and for introducing the Indian Energy legislation, S 524,and S 424. I would be remiss in not also thanking Chairman Domenici and Senator Bingaman for their support and their introduction of alternative energy tax legislation. Your collective efforts provide the tools to create a clean sustainable energy future, not only for American Indian Tribes, but for all Americans.

In my time before the committee today, I will share with you an overview of the resources that are available on America's reservations, the experience of Rosebud, and highlight several key provisions in your legislation which the Intertribal COUP believes are essential in making America's Indian energy potential a reality.

Overview of Tribal Renewable Energy Resources:

Let me begin with the Potential: Slide #1 in your packet, is a color slide graphic that shows information available from the Department of Energy regarding on Tribal renewable energy resources of wind, solar, geothermal and biomass across the United States. While I will limit my remarks primarily to wind power, as you can see, Indian lands are blessed in abundance with a variety of renewable energy resources.

Looking at the wind map, you will see the reservations denoted, with the dark areas the highest sustained wind resource as correlates to the reservations. Looking just at the northern Great Plains, this analysis suggests a potential contribution for electric power supply of over 300 gigawatts from wind power alone! To put that in perspective, this is about one-half of the total installed electric capacity for the entire United States, and over 100 times the capacity of all the mainstream dams on the Missouri River.

The second map does the same for solar resources in the United States as it correlates to the reservations. The third shows the same correlation for geothermal, and the last shows biomass potential. The conclusion is clear; there are abundant untapped resources on American Indian Reservations which can be brought to the benefit not only of the American Indian people but also to the society at large.

Over the years, a number of Tribes have installed a variety of small-scale renewable energy technologies utilizing wind, solar and geothermal. Today, several dozen tribes are in the process of measuring their wind resources, in collaboration with the Department of Energy, through the joint Wind Powering America and Western Area Power Administration's Tribal Anemometer Loan Program.

The Rosebud Sioux Wind Turbine Project Experience:

As you can see from my attachment in the testimony, the Rosebud Sioux Tribe Wind Turbine is up and running today. It is expected to produce on average 2.4 million kilowatt hours of clean electricity annually over the next 20 to 30 years. This is a first its kind in America. It is owned by the Tribe and interconnected to the grid (the largest machine in the world).

In all, it has taken eight years from conception to completion from initiating the necessary tribally anemometer studies in January 1995 to commissioning it in February 2003. We believe we have laid the groundwork for what easily could be another 80 to 130 megawatts of tribal power on reservations in the northern Great Plains over the next 18 months. It is my honor to invite the committee members and the staff to celebrate with the Sicangu Lakota of the Rosebud on May 1st at the Rosebud dedication ceremony.

The Rosebud Project is a collaborative partnership between the Tribe and the Department of Energy. It is the first large utility scale (750 kW) commercial wind development in the lower 48 states that is totally owned and operated by Indians for the benefit Indians. The passage of your Indian Energy legislation before the committee today is a minimum requirement for the dream of 80 to 130 megawatts to become a reality.

As we learned with Rosebud, you cannot finance or build a commercial wind project without a sound business plan that includes good wind data, the necessary interconnection and long-term power purchase agreements. If you do not have accurate data for the resource, the documented desire in the market to purchase the power over a number of years, or a way to get your power to that market, you simply cannot get the financing to build the project.

The sale of "green power" to Ellsworth Air Force Base through a Western Area Power Administration "green tags" program has played an essential role in the completion of Rosebud. Federal support for the ongoing purchase of "green power; and a "green tags" program managed by the power marketing administrations are essential if the federal government is to approach the announced goals of 2 ½% of federal electricity consumption by 2005.

Workable mechanisms to assist and encourage the interconnection of Tribal projects into the federal grid system operated by WAPA must be in place to allow Tribes to build sustainable homeland economies based upon renewable energy generation with the sale of clean energy into both federal and private markets. This means that Tribes

need to work with the federal government and particularly with the Western Area Power Administration as full treaty partners.

But let me be clear: This is not a giveaway!

We believe one of the keys to building new power is the valuation assigned to the power itself. If the generation of electric power was viewed in terms of overall output based standards, i.e., if you look at what is the cost of the emissions plus the cost of the feedstock to create the power, tribal renewable projects, especially wind power, are a better economic deal today!

Even under the old system, competing against one of the oldest and dirtiest grandfathered coal plants, we were economically competitive. Plus, wind projects are more quickly deployed (in a matter of months rather than years as with conventional generation) and can be built in incremental stages allowing for expansion as demand grows.

Key Provisions in S 424:

Sec. 103: Sitting of Energy Facilities on Tribal Land. We would recommend that issues and concerns arising in the context of cultural resources and environment justice with regard to any particularly affect community be specifically addressed, as such issues can delay and ultimately derail or reverse such projects unless adequately addressed up front in the review process.

Sec. 105: Renewable Energy Study. In our view, renewable energy studies and bi-annual reporting are necessary as new barriers will arise from the fact that Tribes often lack control of their own rate bases (Tribes are served by outside utilities) and are treated as "new kids on the block" by the existing utilities, especially with the application of newer renewable energy technologies that the existing utilities either have little experience with or consider competition to their established markets.

Sec. 106: Federal Power Marketing Administrations: Overall, the Federal Power Marketing Administrations are critical to the development and expansion of tribal wind power. In the Dakotas and for Tribal renewable energy development in some 15 states across the West, the WAPA federal transmission grid crosses or interconnects to the vast majority of Indian reservations. WAPA, along with the Bonneville Power Administration, provide our "farm to market roadways". They are in strategic positions to facilitate the collection of tribal energy generation and for the delivery of tribal green power to federal facilities throughout the west. Further, under a tribal "green tag" program, the federal power administrations could meet the entire federal governments "green power" requirements under Executive Order 13101and, in particular, the goal of Executive Order 13123 for the use of tribal renewable energy sources to generate the equivalent of 2.5% of federal facility electricity consumption by 2005, in both the most cost efficient and energy efficient manner, while building our reservation economies.

Specifically, I would recommend the insertion of the words " and replacement" following the term "firming" with regards to Western's purchase of renewable energy, especially in light of the diminished hydropower in the region due to the ongoing drought. Western has seen high increases in the cost of replacing hydropower in the Missouri River basin due to the changing climate precipitation patterns in the region. Including only "firming" requirements leaves to door open to denying any purchase of renewables based upon Western's determination that wind and solar are not sources of firm power.

In section (B) (iii), we would suggest the insertion of the words "and transmission" after "use of Federal power".

Also, based upon experience in the Northern Great Plains, I have been asked to request that where the word "may" is used in terms of Western's working with the Tribes, that drafters consider the word "shall" to assure a mutually cooperative working relationship.

Sec. 107: Feasibility Study for Combined Wind and Hydropower Demonstration Project:

Generally, the same comment as above on "firming and replacement". In (a)(4) I would suggest that "a determination of resource" be spelled out to specifically to include "transmission access and capacity" along with wind energy.

In section (c) (4), we would recommend the insertion of the word "cultural resources" after the word "economic" in the phrase "economic and environmental benefits..."

Sec. 201: Renewable Energy Production Incentive.

This is long over due, and is a good first step; but may not go far enough to assist in large scale development. The inability of Tribes to own a project and receive a bankable "Production Tax Credit" that has driven non-Indian renewable energy development is a major economic barrier that disadvantages the financing of large tribal projects. Simply put, the REPI is not bankable, since it can't be included in a business plan. The power of making Tribes eligible for the bankable PTC that is assignable, tradable, or which could be used to offset federal loan financing, would greatly encourage Tribal renewable development.

Key Provisions in S 522:

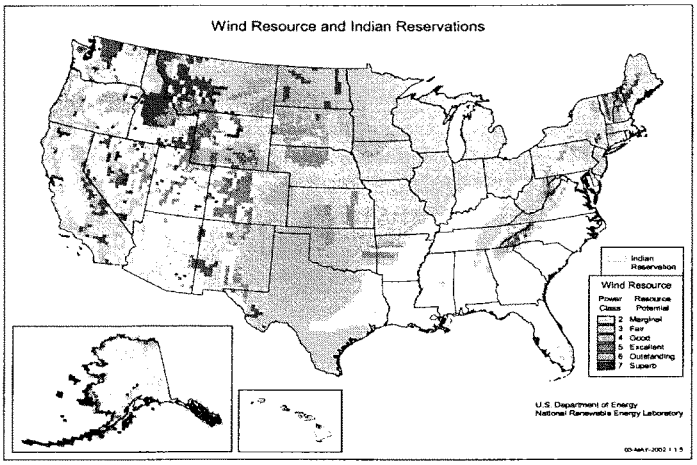
Section 2602: Definitions. (11) Vertical Integration of Energy Resources.
We would recommend that "(B) electricity transmission" also include "distribution".

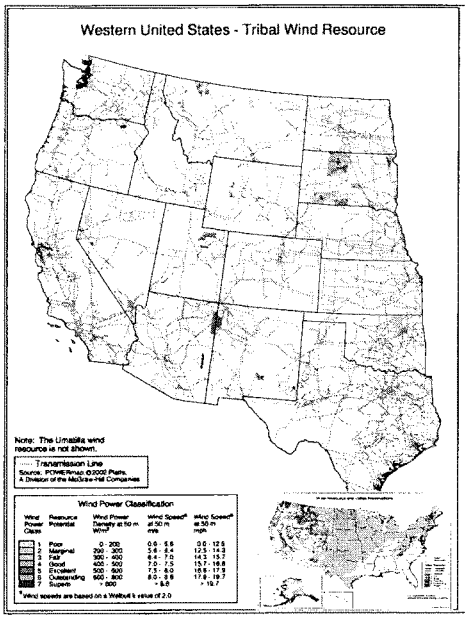
Section 2605: Leases, Business Agreements, and Rights-Of-Way Involving Energy Development or Transmission. (e) Tribal Regulatory Requirements. (C) Environmental Review Process. Same as above in Section 103 of S. 424.

Let me conclude by thanking the Committee and its members for the introduction of stand alone Indian Energy legislation and for the opportunity to appear before you today. I would respectfully request the opportunity of submitting extended written testimony on some of the points highlighted this afternoon. I stand ready to answer questions you may have and pledge the Intertribal Coup's support in assisting in the passage of the legislation through the Congress this year. .

APPENDIX

Testimony of Intertribal Council On Utility Policy
Senate Indian Affairs and Energy Committees Hearing
March 19, 2003





TRIBAL WINDPOWER: CLEAN, UNTAPPED, INEXHAUSTIBLE & COMPETITIVE

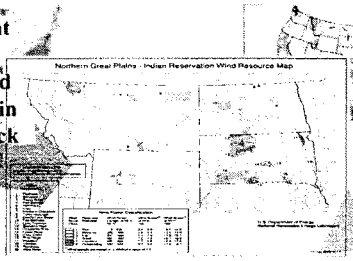
- American Indian Tribes have tremendous untapped renewable energy resource potentials.
- On and off-grid applications can be used to meet local Tribal needs.
- Tribes are interconnected to federal WAPA/BPA grids for off-reservation sales.
- Federal Power Marketing Administrations could efficiently serve "green" markets.
- Windpower = Zero emissions.
- Distributed Indian owned wind power could cost effectively meet federal, state and tribal renewable portfolio standards (RPS).

Intertribal Council On Utility Policy

TRIBAL WIND - FEDERAL HYDRO:

Windpower can break a positive feedback loop in the CO2 Energy Cycle

Drought and Reduced Mountain Snowpack



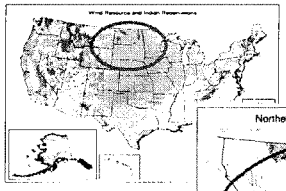
Excessive Rainfall and Flooding

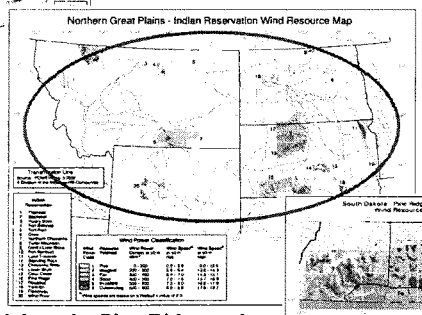
Tribal Wind **can replace diminishing Federal Hydropower on Western Transmission Grid.**

- ... Increased drought and precipitation shifts, which are consistent with changing climate forecasts, are associated with increased levels of CO2 from coal fired power plants -- Reduced snowpack and drought are likely to be the "New Normal" for the West!
- Missouri River dam operations managed by the Army Corps of Engineers are based upon the last 100 yrs. of flow -- hydropower production for WAPA is based on the "Old Normal".
- Hydropower is only an incidental responsibility of the Corps of Engineers. COE holds back water due to drought and flood conditions, reducing hydroelectric power generation.
- Hydropower marketing administration (WAPA) buys coal power to offset hydropower shortfalls, increasing the atmospheric CO2, resulting in greater drought and precipitation shifts, leading to ...

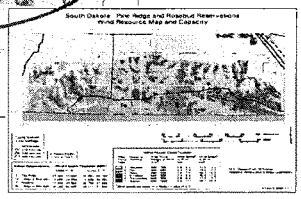
Intertribal Council On Utility Policy

The TREMENDOUS WIND POWER RESOURCES found on the NORTHERN GREAT PLAINS INDIAN RESERVATIONS:





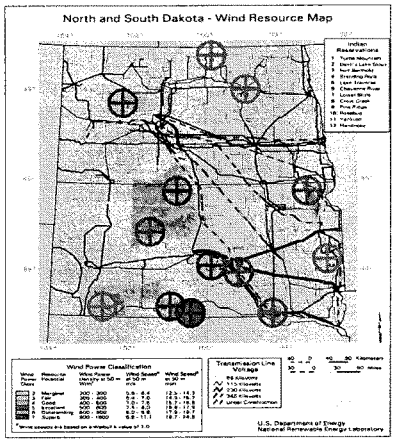
Twenty Northern Plains Indian Reservations hold several hundred gigawatts of wind power potential.



Windpower potential on the Pine Ridge and Rosebud Reservations alone are enough to met the Kyoto targets for all of North America.

Intertribal Council On Utility Policy

INTERTRIBAL Council On Utility Policy
Tribes with Commercial Wind Resource Data



Twelve Reservations with 250 to 300 GW of wind power potential

Four Tribes with at least 40-50 meter tower anemometer wind data in the Dakotas

Federal hydro-power dams:
4 in SD, 1 in ND and 1 in Montana

Intertribal COUP Tribes in North and South Dakota

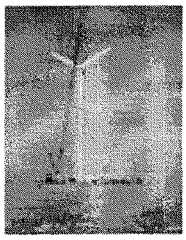
- Without Data
- With Wind Data
- Commercial Data
- .75 MW Turbine

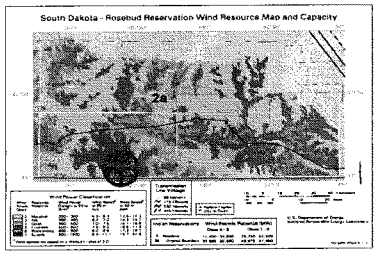
Intertribal COUP
Council On Utility Policy

Rosebud 750 kW Wind Turbine
Installation: Feb. 27 2003 ~ Dedication: May 1st, 2003

The first Tribally owned 750 kW utility scale NEG MICON wind turbine operated by the Rosebud Sioux Tribe in partnership with:

- Department of Energy (DOE)
- Rural Utilities Service (RUS/USDA),
- DisGen, Inc. (Engineering)
- Basin/CherryTodd/ NPPD/ WAPA/ Ellsworth AFB
- Native*Energy*, Inc. (Green Tags)





SIGNIFICANT ACCOMPLISHMENTS:

- 1st DOE Commercial Tribal Project
- 1st Tribally-Owned 750 kW Turbine
- 1st RUS loan for Tribal Wind
- 1st Tribal Green Tag sales
- 1st Tribal-DOD Green Power sales

Rosebud Wind Power Electric Potential (MW)

	Class 4-6	Class 2-6
Todd Co:	17,400 - 34,000	25,750 - 51,500
Original:	30,260 - 60,560	48,975 - 97,950

Intertribal Council On Utility Policy

PRESS RELEASE ~ Indian Energy Legislation
INTERTRIBAL Council On Utility Policy
P.O. Box 25, Rosebud, South Dakota 57570
Patrick Spears, President, Intertribal COUP 605-945-1908
Senate Indian Affairs Committee Hearing on S. 424 and S. 522
Washington, DC March 19, 2003.

"American Indian lands are blessed in abundance with a variety of renewable energy resources which can play a significant role in America's Energy Independence. It offers the opportunity for clean "home grown" sustainable economic development for the American Indian people. This stand alone legislation offers the tools for Indian energy development to enter the 21st century." said Bob Gough, of the Rosebud Sioux Tribe Utility Commission and secretary for the Intertribal Council On Utility Policy (COUP) in testimony before the Senate Indian Affairs Committee on pending Indian Energy legislation, S 424,and S 522.

"In just the Northern Great Plains, Indian Tribes have a potential of over 300 gigawatts from wind power alone. Put in perspective, this is about one-half of the total installed electric capacity for the entire United States, and over 100 times the capacity of all the mainstream dams on the Missouri River," Gough told the committee.

Intertribal COUP testimony provided the committee with an overview of the resources that are available on America's reservations, the experience of Rosebud, and highlight several key provisions in your legislation which the Intertribal COUP believes are essential in making America's Indian energy potential a reality.

"The Rosebud Sioux Tribe has brought the first large utility scale (750 kW) commercial wind development project in the lower 48 states that is totally owned and operated by Indians for the benefit Indians, in a collaborative partnership between the Tribe and several federal agencies. The passage of the Indian Energy legislation before the committee today is a minimum requirement for the dream of large scale renewable energy projects to become a reality in Indian Country." Gough reported to the committee.

"Based upon the lessons we have learned with the Rosebud project, we believe with passage of this legislation the Great Plains Tribes could easily bring another 80 to 130 megawatts of tribal power on reservations in the northern Great Plains over the next 18 months, and some 3,000 megawatts in the next 5 years." Gough said. "

"Let us not hold Indian energy development hostage to the more politically divisive issues in the federal energy legislation. Let us pass this legislation and get started this year creating jobs in Indian Country and clean power for America" Gough said.

Indian-Affairs, Testimony (Indian Affairs)

From: Alicia Bell-Sheeter [abellsheeter@firstnations.org]
Sent: Thursday, March 27, 2003 1:43 PM
To: Indian-Affairs, Testimony (Indian Affairs)
Subject: S. 424 & S. 522 - Hearing of March 19th, 2003

The Honorable Ben Nighthorse Campbell
Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington DC 20510

March 27, 2003

Dear Mr. Chairman:

We respectfully submit the following statement for the record regarding proposed legislation S. 424, the Tribal Energy Self-Sufficiency Act and S. 522, the Native American Energy Development and Self-Determination Act.

There are some excellent provisions in the proposed legislation, many of which appear to derive from the Inter-Tribal Energy Network (ITEN) scoping process conducted last fall and early this year. Positive provisions include funding and technical assistance for energy development generally, and renewables particularly, resolution of dual taxation issues, loan guarantees, and Indian preference in federal purchase of power supplies.

However, many of these activities represent an investment over time to allow tribes to develop the capacity to fully realize the benefits of their energy resources. A quick review of the ITEN reports also suggests a more future orientation than is provided for by the pace of the legislative process on these bills. While conceptually these bills provide great opportunities for energy resource tribes, current circumstances may be less than optimal for tribes to negotiate fair and equitable energy development agreements, particularly in light of pressures nationwide to open new areas to development, and often by less than environmentally sensitive and/or fair-minded energy developers. That said, there are, of course many tribes who are well positioned to benefit by this proposed legislation, albeit some of those, too, have questioned provisions that abrogate the United States' trust responsibility.

While there is much good in these bills, there are also serious concerns raised by several of the proposed provisions. These bills appear to be designed as tools for trust "reform" either overtly, by legislated abrogation of the government's trust responsibility (see discussion below), or more indirectly, as evidenced by sections of S. 522 that address the Indian Resource Energy Commission.

Key language in both bills relieves the United States of its trust responsibility, specifically sections 103(f)(5)(B) of S. 424 and 2605(e)(5)(B) of S. 522, which state that in the case of tribal regulations that permit (lease or royalties) payment directly to the Indian tribe, the tribe shall submit "documentation of those payments sufficient to enable the Secretary to discharge the trust responsibility of the United States as appropriate under applicable law." Additionally both bills include a provision whereby, "[T]he United States shall not be liable for any loss or injury sustained by any party (including an Indian tribe or member of an Indian tribe) to a lease, business agreement, or right-of-way" executed in accordance with approved tribal regulations.

S. 522 establishes an Indian Energy Regulatory Commission charged with developing proposals for the entire range of energy development issues from dual taxation to royalties management. On the face of it appears to be a mechanism whereby the entire trust reform agenda is transferred to a twenty-member commission for resolution - a commission wherein the majority control is in the hands of non-Native Americans. Where is the opportunity for self-determination in such a body? If tribes are to assume full management responsibility and liability for energy development on their lands as the proposed legislation would have, then one would assume they also would maintain full control of any regulatory body designed to oversee such operations. Additionally,

appellate authority would rest with the Secretary of Energy in the event of tribal non-compliance (and after exhaustion of tribal remedies). Again, if tribes are truly to be recognized as sovereign authorities over energy development on their lands, disputes should be resolved in tribal courts, not by the Secretary.

During the hearing on this legislation, Ms. Rosier, Counselor to the Assistant Secretary - Indian Affairs, stated that environmental review processes under the National Environmental Policy Act would be pre-empted by tribal environmental regulations initially approved (and one-time) by the Secretary. Typically, in cases where entities other than the federal government assume environmental regulatory authority, new standards) must meet or exceed federal standards, i.e., those of the Environmental Protection Agency. However, in the case of both of these bills, it is the Department of Interior and/or the Department of Energy who have final approval over tribal environmental regulation. There are no provisions in either bill for technical assistance to be provided by the EPA, the agency responsible for enforcement of clean air and water provisions. Nor are there provisions for assistance from any other agency charged with natural resource management such as the Forest Service, within the U.S. Department of Agriculture. In addition, technologies and energy development activities change, but there are no provisions in the proposed legislation to assist tribes in responding to future environmental impacts. Coal bed methane development is a case in point, where many areas poised to receive the brunt of impacts are still struggling to determine exactly what the impacts will be from intensive development. Such development has the potential to adversely impact soil conditions, water and air quality, and precious water supplies - water upon which many Native communities are heavily dependent for their primary economic activity, agriculture.

We support the proposed provisions to boost renewable energy development in Indian Country and to allow tribes to develop their capacity to fully manage their energy resources.

In a perfect world, where Native Americans have fully achieved their rightful sovereign status and possess full capacity to realize the benefits of their resources, these provisions might be welcome - but the world is not perfect, and many Native communities are far and away the most disadvantaged people in the country. The trust responsibility of the United States government is an obligation to protect tribal lands, assets, and resources, and has been defined by the U.S. Supreme Court as "moral obligations of the highest responsibility and trust" (Seminole Nation v. U.S., 1942). Abolishing this responsibility with a small provision in the energy bill is one of the more egregious acts - in a long litany of such acts - that could be taken by the federal government. In order to ensure that tribal energy development is undertaken in a sustainable, economical, and environmentally sound manner, the appropriate technical assistance and resources must be made available to under-capitalized resource tribes prior to the drilling of the first well or the granting of the first pipeline easement.

Sincerely,

Rebecca L. Adamson
President

Testimony of
Affiliated Tribes of Northwest Indians – Economic Development Corporation

Before the
Senate Energy Committee and the Senate Indian Affairs Committee
U.S. Senate

Tribal Energy Self Sufficiency Act and Native American Energy Development and Self-Determination Act of 2003
Washington, D.C.
March 19, 2003

Thank you for the opportunity to offer testimony regarding the development of energy resources on Indian lands, and current legislative proposals, S.424, The Tribal Energy Self-Sufficiency Act (TESSA); and S.522 the Native American Energy Development and Self-Determination Act of 2003 (NAEDSDA). ATNI-EDC strongly supports these bills to encourage the development of both renewable and mineral resources. They are great steps forward in assuring a stable energy future for the United States and to assure tribal participation in energy businesses. We would like to describe our activities in support of development of energy resources on Indian lands. Then we have some general comments on both bills, then a few specific comments regarding the language in each bill.

The Development of Energy Resources on Indian Lands in the Pacific Northwest:

The Affiliated Tribes of Northwest Indians – Economic Development Corporation (ATNI-EDC) is a non-profit organization formed almost 50 years ago with 54 member Tribes located in Alaska, Washington, Oregon, Idaho, Montana, Nevada and Northern California. Our membership is acutely interested in local, regional and national energy matters with many Tribes actively involved in energy related projects and the hydroelectric issues of the Pacific Northwest.

Because energy matters are critical to tribal economic development, the ATNI-EDC Tribal Energy Program was created in 1997. Since that time, we have provided energy information and educational programs to our membership, participated in the formulation of national and regional energy policy, participated as a full member of the Regional Representative Group for the formation of RTO West (a Regional Transmission Organization required by the Department of Energy's Federal Energy Regulatory Commission's Order 2000), participated in regional utility rate making issues, developed an energy efficiency and conservation program for our membership, and worked in

partnership with the Bonneville Power Administration to address tribal energy issues. Unfortunately, the Tribal Energy Program is not now funded, with the exception of our participation in the formation of RTO West which is funded by the Bonneville Power Administration. There simply is very little funding available for these types of programs. We therefore strongly support the provisions in these bills which would provide funding sources for energy related matters.

Our membership is looking for ways to support environmentally sound solutions to our national energy challenges while encouraging energy and economic development on the poorest and least developed lands in America, our reservations. Our member Tribes are very active in developing energy resources and energy programs on their lands. Current projects substantially underway by our member tribes, most with industry partners, include:

- An operational tribal utility serving Indian and non-Indian residents of the reservation (Salish-Kootenai, MT)
- A large-scale gas-fired power plant (Umatilla, OR)
- Partnership in the ownership of a large hydroelectric dam (Warm Springs, OR)
- Energy efficiency projects for tribal housing (Coquille, WA)
- A power marketing company (Spokane, WA)
- A biomass generation facility utilizing timber industry wastes (Colville, WA)
- Holistic evaluations of energy opportunities on Tribal Lands (Shoshone-Bannock, ID; Colville, WA)
- Development of utility regulations and a tribal utility (Yakima, WA)
- Oil and Gas development (Blackfeet, MT)
- Participation in extensive public processes for utility ratemaking (Columbia River Intertribal Fish Commission: Nez Perce, ID; Warm Springs, OR, Yakima, WA, Umatilla, OR and the Upper Columbia United Tribes: Colville, WA; Spokane, WA; Kooetnai, ID; Kalispel, ID, Coeur d'Alene, ID)
- Parties to federal dam relicensing matters at FERC (Columbia River Intertribal Fish Commission)
- Participation in federal processes involving the utility industry's impact on fish and wildlife (Numerous Tribes)
- Distributed wind generation projects (Numerous Tribes)
- Wind generation potential for commercial wind projects (Numerous Tribes), and
- A distributed solar generation project (Burns Paiute, OR)
- A wave generation study (Makah, WA)

One member Tribe, the Cow Creek Band of Umpqua Tribe of Indians, began operation of the first new U.S tribal utility in over 15 years on October 1, 2001, as a customer of the Bonneville Power Administration. One member Tribe, the Blackfeet Tribe began receiving an allocation of hydroelectric power from the Western Area Power Administration at the beginning of 2001 through their current utility service provider.

In addition, ATNI-EDC is a full participating member of the Regional Representative Group for formation of RTO West. RTO West is a new Regional Transmission

Organization being formed to operate the high-voltage transmission system in Washington, Oregon, Idaho, Wyoming, Nevada, Utah, British Columbia, and possibly Alberta. ATNI-EDC represents the following six tribal interests as they were described to us by our membership:

1. Energy development and transmission programs should honor our sovereign governmental status.
2. Our land rights should not be adversely affected by changes in the energy industry.
3. Our cultural resources and fish, wildlife and treaty resources should not be harmed by energy operations.
4. Indian people are energy consumers whose rates should be considered.
5. Tribes are also owners of energy resources and are seeking to use those resources, whether renewable or non-renewable, to generate electricity and economic development and need access to transmission.
6. Lastly, Tribes seek a continued voice in public processes regarding energy matters.

We have been active in commenting on federal energy regulatory changes and as an intervener in proceedings before the Federal Energy Regulatory Commission to protect our memberships' interests.

Our energy interests run the whole spectrum of the national energy interests; however we are the most economically disadvantaged citizens to participate in energy matters. Our membership rarely has staff available or technical expertise necessary to properly protect all our interests or to take advantage of all our opportunities. Indian people spend a higher percentage of their income on energy than other Americans, have the highest percentage of homes without electricity, have the least control over quality of service, and are experiencing two to three times the national population growth. We are also sovereign governments with limited ability, due to jurisdictional ambiguities, to take responsibility for one of the most important of all infrastructures to economic development, the utility infrastructure. Indian reservations have the highest regional levels of unemployment in the nation and tribes are actively seeking to create jobs. Energy opportunities are therefore very important. However, we have faced many regulatory and legal obstacles to energy development. We have high hopes that many of the obstacles can be removed through this energy legislation.

General Comments on Bills

ATNI-EDC strongly supports these bills to encourage the development of both renewable and mineral resources. The bills help to assure tribal participation in energy businesses and helps to assure domestic energy production. We very much appreciate the efforts of the Committee and the Senators and Staff to bring these bills to fruition.

We would especially like to sincerely thank the Committee and bill sponsors for inclusion of the funding and grant provisions in the bill. The provisions are terribly important to provide tribal governments with energy education, research and

development, planning and management resources. They are also important to assure Tribes and industry developers that new tribal energy projects have a federal customer.

We feel there is one important addition to be made to the bill(s) with regard to the listed funding authorities.

In Sec. 2607(b)(2) of the TESSA, and Sec. 2604(b) of the NAEDSDA, we would like to propose that funding also be made available for tribes that are working to protect their land, fish, cultural and other resources during the hydroelectric dam relicensing proceedings. Most privately owned and operated dams were constructed 40-45 years ago and were given 50 year licenses. At the time of their construction, these dams destroyed many tribal resources without any tribal recourse. Almost all of the dams now continue to impact tribal lands or treaty resources. In the next 5-10 years, the Federal Energy Regulatory Commission (FERC) will be working to relicense these dams. The FERC proceedings provide for tribal participation, however the proceedings are very technical and complex. Tribes wishing to meaningfully participate in these proceedings to protect their fish, wildlife, cultural/archaeological, water, and land resources must spend significant time and hire legal and technical experts to provide testimony and other input. There is currently no good source of funding for these projects, except for a Tribe's own funds. Many of the less wealthy Tribes can not participate at all. It is an important federal responsibility to make sure that these tribal treaty resources are not further eroded by relicensing proceedings.

ATNI-EDC supports the creation of an Office of Indian Energy Policy and Programs within the Department of Energy and/or the establishment of the Indian Energy Resource Commission under NAEDSDA. Either model will benefit Tribes by providing a point of contract to address energy matters and by creating a forum for resolution of issues. The best case scenario is that both models are authorized to fulfill the duties set forth in the bills. It is critical, however, that funds are appropriated for these purposes, and that these authorities are not just empty promises.

We also strongly support the Indian Energy Preference contained in the TESSA under which a federal agency or department may give a preference to tribal businesses in the purchase of energy products. This provision will create options for tribal energy businesses to break into energy markets. Often the energy markets and their systems for delivering energy products to market hubs are already fully utilized by the entrenched energy companies. The geographical diversity of federal facilities gives many remote Tribes a local market for their product. We would support changing "may" give a preference to "shall" give a preference.

We also support new provisions that will give Tribes more decision authority in the siting of energy projects and the leasing of tribal resources. Because these authorities are generally state authorities, many federal policies direct the interaction with states when energy decisions are made. In truth, Tribes, or the Bureau of Indian Affairs on behalf of Tribes have always had siting decisions on tribal lands. A legislative direction to federal policy makers at FERC and in the Department of Energy that Indian Tribes be included

in processes seeking state input on energy siting and policy matters would clarify the Tribes' authorities as granted in these bills.

We appreciate the grant support these bills provide to improve tribal laws and regulations. Please do note, however, that recent Supreme Court decisions and other litigation active around the country create an ambiguity in tribal regulatory authority as it applies to non-Indians within reservations. For energy regulation, one can not write regulations that apply only to Indians and not non-Indians due to the interconnected nature of energy delivery systems. When regulations are drafted that apply to both Indians and non-Indians, states or energy companies often object to the tribal regulatory authority, foiling any regulation. There is a sure need to obtain a legislative fix to the ambiguity in federal case laws. The "fix" should provide Tribes the regulatory authority over all companies doing business on the reservation and their business activities within the reservation.

Technical suggestions to TESSA:

We ask that Section 2607(b)(4) be deleted. This section gives a priority to grants to Tribes with inadequate electrical service. Our request is made because many of the grants authorized under this section are not designed to improve electrical service. Section 2607(b)(iii) already contains a provision giving the Director *discretion* to consider the number of households that have no electric service or are underserved when deciding on competitive grants. We feel that this discretion is appropriate. The section we propose to delete contains a legislative mandate that could be used to assure that a lion's share of funding go to only the few Tribes who have a large underserved population.

In Section 102, adding Sec. 217, the addition of the word "tribal" before "energy costs" in 217(b)(1)(c) would clarify that the goal is to lower or stabilize tribal energy costs not energy costs generally. In the past we have seen that one of the best ways to lower energy costs for many consumers is to destroy or misappropriate tribal resources. For example, the cost of hydroelectric power is much lower if tribal treaty fish obligations are ignored when water is scarce. The cost of electricity from generated from tribal coal is lower if tribal coal royalties or water leasing costs are unfair to Tribes. The cost of oil and gas is lower if tribal royalties are not paid to tribal beneficiaries. These examples are all real and exactly the kinds of situations we would like to avoid.

Technical Suggestions to NAEDSDA:

This bill adds a new Sec. 2607 addressing Energy Efficiency and Structures on Indian Land. We support the addition of authorities in this provision for technical assistance and funding for the purpose of improving indoor air quality in reservation housing. A much greater percentage of Indian homes than non-Indian homes use wood or coal burning as either the only or a supplemental source of home heating. These fuels and the abundance of very old stoves and other burning equipment, poor housing construction,

and inattention to chimney cleaning practices, are an important source of serious indoor pollution which has dramatic health impacts. There have been very few opportunities to address this issue, and we would appreciate authorization for this kind of funding.

Thank you again for this opportunity to provide this testimony. Please contact Margaret Schaff at (303) 443-0182 or the ATNI-EDC staff at 206-542-5115 for additional information.

COMMENTS OF THE AFFILIATED TRIBES OF NORTHWEST INDIANS ECONOMIC DEVELOPMENT CORPORATION ON S. 522

April 17, 2003

The Affiliated Tribes of Northwest Indians Economic Development Corporation has three comments for the consideration of the Senate of the United States regarding the April 7, 2003 version of S. 522. Thank you for the opportunity to submit these comments. If there are any questions, please call Margaret Schaff at (303) 443-0182.

First, we have become aware that provisions for the availability of accelerated depreciation for projects on Indian Lands will sunset in 2004. While that issue is not now addressed in S. 522, the ability for energy partners of Indian Tribes to accelerate their depreciation of capital equipment and other property used on Indian Lands for Tribal projects is an excellent enticement for companies to plan and keep projects on Indian Lands. We would appreciate your consideration for an extension of the accelerated depreciation for a term that will favorably impact the financing of tribal energy projects.

Second, there is certain concern in the tribal energy community that Section 2605, regarding "Business Agreement, and Rights of Way Involving Energy Development or Transmission" will be too controversial among the environmental community or may unfavorably impact on sensitive issues of the federal trust responsibility. It is our recommendation that the provision be retained, even in light of those issues. We do support a reasonable amendment of the provisions to mitigate these issues and will work with the staff if this option is chosen. We believe that for tribes choosing to invoke this option, the option will represent an excellent alternative to existing rules. Because the provision contains an option only, we do not believe it should be removed for reasons expressed by other tribal groups.

Third, we support statements of the Intertribal Council on Utility Policy regarding the renewable energy provisions that did not make it into the bill. That statement is set forth below:

> CHANGES TO SECTIONS 2607 and 2609
>
> SECTION 2607: Federal Power Marketing Administrations:
>
> In the Dakotas and for Tribal renewable energy development in some 15 states across the West, the Western Area Power Administration's federal transmission grid crosses or interconnects to the vast majority of Indian reservations. WAPA, along with the Bonneville Power Administration, control our "farm to market roadways". The Power Marketing Administrations are in strategic positions to facilitate the collection of distributed tribal renewable energy generation and for the delivery of tribal green power to federal facilities throughout the West. Further, under a tribal "green tag" program, the federal power administrations

could meet the entire federal governments "green power" requirements under Executive Order 13101 and, in particular, the goal of Executive Order 13123, for the use of tribal renewable energy sources to generate the equivalent of 2.5% of federal facility electricity consumption by 2005, in both the most cost efficient and energy efficient manner, while building our reservation economies.

AFTER "Firming" ADD "supplemental and replacement"
PAGE 37, LINE 10.

Specifically, I would strongly recommend the insertion of the words " and replacement" following the term "firming" with regards to Western's purchase of renewable energy, especially in light of the diminished hydropower in the region due to the ongoing drought. In fact, you may consider replacing or adding after the word "firming" the words "supplemental or replacement" power or energy.

COMENT: Wind power is not firm power (and neither is hydro-power in many cases). WAPA distributes hydropower when it is available, and currently "firms" the hydropower with coal power. Wind is more akin to hydropower in that both may require supplemental "firming". Western has seen high increases in the cost of replacing hydropower in the Missouri River basin due to the changing climate precipitation patterns in the region. Including only "firming" requirements leaves to door open for denying any purchase of renewables based upon Western's determination that wind and solar are not sources of "firm power". WAPA has many years of experience firming hydropower, which could be readily applied to firming wind power.

In section (B) (iii), we would suggest the insertion of the words "and transmission" after "use of Federal power".

Also, based upon experience in the Northern Great Plains, I have been asked to request that where the word "may" is used in terms of Western's working with the Tribes, that drafters consider the word "shall" to assure a mutually cooperative working relationship.

SECTION 2608: RENEWABLE ENERGY STUDY be re-included.
Tribal Leadership also endorses the inclusion of what was formerly identified as Sec. 105: RENEWABLE ENERGY STUDY as a separate section (in either SEC. 2608 or 2609).

In our view, renewable energy studies and bi-annual reporting are necessary as new barriers will arise from the fact that Tribes often lack control of their own rate bases (Tribes are served by outside utilities) and are often treated as "new kids on the block" by the existing utilities, especially with the application of newer renewable energy technologies that the existing utilities either have little

experience with or consider competition to their established markets. Given the goal of vertically integrated tribally controlled energy infrastructure on a reservation, this is an important safeguard.

FORMER SECTION 201: Renewable Energy Production Incentive.

This is long over due, and is a good first step; but may not go far enough to assist in large scale development. The inability of Tribes to own a project and receive a bankable "Production Tax Credit" that has driven non-Indian renewable energy development is a major economic barrier that disadvantages the financing of large tribal projects. This was included last year in HR4. Simply put, the REPI is not bankable, since it can't be included in a business plan. The power of making Tribes eligible for the bankable PTC that is assignable, tradable, or which could be used to offset federal loan financing, would greatly encourage Tribal renewable development.

ADDITIONAL KEY PROVISION:

To the Senate Energy Bill marked S.L.C. introduced by Mr. Grassley, Mr. Baucus, Mr. Domenici, and Mr. Bingaman, entitled: A Bill to Amend the Internal Revenue Code of 1986 to provide energy tax incentives, the following amendment be included:

Sec. 104. Treatment of Persons not able to use entire credit.
(a), (8), (B), (iv) Allocation Among Co-Owners. An Indian tribal government as described in subparagraph (A)(v) may transfer any credit to which subparagraph (A)(I) applies through an allocation to another co-owner of the same project, irrespective of the proportion of ownership in the project.

Comment: This would allow an investing partner to take the full tax credit available to a project, without requiring the investor to be the full owner of the project. Currently, the tax credit is apportioned to the per cent of ownership in the project. The above amendment is limited to Indian Tribes, to come under the jurisdiction of the Indian Affairs committee. This amendment would be tax neutral when compared to any non-Indian project.

STATEMENT OF
SHARON BUCCINO, SENIOR ATTORNEY
NATURAL RESOURCES DEFENSE COUNCIL

REGARDING S. 424 and S. 522

The Natural Resources Defense Council ("NRDC")[1] supports efforts to ensure that energy development on tribal lands benefits the tribes. Doing so requires a process that ensures that the public is included and that environmental impacts are addressed. An effective public participation process is necessary to ensure that all within a tribe have a voice. In addition, giving those outside Indian Country who may be affected by a tribal decision the opportunity to be heard is essential to avoiding conflict. An effective environmental review process is necessary to ensure that development moves forward in a way that preserves cultural resources, treasured landscapes and traditional ways of life.

As the Committee appropriately recognizes, tribes are an essential part of any national energy policy. Tribal lands offer some of the best opportunities to develop renewable energy sources, including wind and solar. In addition, numerous opportunities exist to improve access and efficiency in delivering electricity to tribal communities. NRDC strongly supports providing grants and technical assistance to tribal communities to pursue these opportunities. Legislation should explicitly provide that such assistance is available to analyze impacts of proposed development on natural and cultural resources.

NRDC urges the Committee to limit proposed changes in decision-making authority to electricity. The potential adverse impacts of oil and gas development are generally much greater than electricity projects. Consequently, potential liability from these projects is greater and the removal of federal liability proposed by the legislation is more significant. Controversy and conflict can be avoided by excluding oil and gas from the legislation.

Changes to Improve Public Participation and Environmental Review

The process for involving the public and conducting environmental review is essentially the same in both S. 424 and S. 522. Both bills provide a process by which tribes may develop regulations to govern decisions related to energy development. Once the federal government approves these regulations, a tribe can then make decisions about a specific energy project without federal approval. Once there is no longer a federal action involved, the National Environmental Policy Act ("NEPA") would no longer apply. Consequently, it is important to ensure that new process achieves the public participation and environmental review goals of NEPA.

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[1] NRDC is a non-profit organization with over 500,000 members across the country dedicated to the protection of public health and the environment. NRDC has offices in Washington, DC, New York City, San Francisco and Los Angeles.

NRDC recommends the following specific changes to improve this process. The criteria of NEPA provide an appropriate model for elements of tribal regulations governing energy development. Several essential elements of NEPA are missing in the proposed legislation. The Committee's legislation should:

1. Add an obligation to respond to public comments
2. Include an obligation to address all potential impacts to both natural and cultural resources
3. Include an obligation to address alternatives to a proposed project (alternatives should include different levels of development, as well as a no action alternative)
4. Include an explicit requirement for mitigation of adverse impacts and monitoring
5. Add an enforcement mechanism to ensure that mitigation and monitoring occurs as planned
6. Clarify the rights to appeal a tribal decision

The Secretary of the Interior, rather than the Secretary of Energy, is the appropriate official to approve tribal regulations regarding energy development. The Secretary of the Interior currently has decision-making authority for energy development on federal lands. The Department of the Interior—not the Energy Department—has expertise in land management and operates under statutory mandates to balance a variety of competing uses. The Committee's legislation should:

1. Require the Secretary of the Interior to provide notice and an opportunity to comment regarding approval or disapproval of tribal regulations regarding energy development
2. Explicitly provide that the Secretary of the Interior's decision to approve or disapprove a petition for non-compliance with tribal regulations is a final agency action subject to judicial review in federal court
3. Include standards for the Secretary's decision in reviewing tribal regulations and petitions regarding compliance with tribal regulations
4. Provide for the extension of deadline for review if necessary to comply with applicable federal laws including NEPA

Additional resources are necessary to enable tribes to collect and analyze information about the impacts of proposed development on natural and cultural resources. Because of a lack of resources, few tribes have been able to take advantage of the opportunity to enact tribal environmental policy acts. In comparison, most states have state environmental policy acts modeled on NEPA. The legislation should expand the grants and technical assistance to tribes to include environmental analysis. In addition, the legislation should provide tribes the opportunity to obtain funds from a project applicant for mitigation of a project's adverse impacts on natural and cultural resources, as well as monitoring to ensure that the mitigation occurs.

Scope of Legislation Should be Limited to Electricity

A major difference between S. 424 and S. 522 is the scope of activity and the type of lands covered. S. 424 covers leases and rights-of-way for electric generation, transmission, distribution, or processing facilities. Sec. 217(b) & (c). S. 522 covers all "energy development or transmission," including oil and gas. Sec. 2605(a) & (b). The geographic scope of S. 522 is also significantly greater than S. 424. S. 522 covers individual allotments outside reservation boundaries, while S. 424 is limited to tribal lands. Cf. S. 522, Sec. 2605(a)(1) with S. 424, 103(a)(6). In addition, S. 522 includes lands owned by Alaska Native Corporations while S. 424 does not. Sec. 2602(5)(D).

NRDC supports the more limited scope of S. 424. The potential adverse impacts of oil and gas development are generally much greater than electricity projects. Oil and gas projects are more likely to have impacts, including water and air pollution, beyond the particular parcel of land on which the project is proposed. Controversy and conflict can be avoided by limiting the bill to electricity.

Limiting the bill to electricity limits the legislation's effect on the federal government's trust responsibilities to tribes. Both bills waive federal liability for decisions transferred to the tribes. S. 424, Sec. 103(f)(6); S. 522, Sec. 2605(f)(2). The consequences of this provision are particularly great when applied to oil and gas development where the potential impacts/ damage is great.

As the U.S. Supreme Court has recently made clear, removing the Secretary of the Interior from management decisions undermines the federal government's liability for those decisions. See United States v. Navajo Nation, 123 S. Ct. 1079, 1091 (2003) ("the undisputed existence of a general trust relationship between the United States and the Indian people . . . alone is insufficient" to support a claim for compensation). Even if the federal government is relieved from liability for damages, it still has a critical role to play. The federal government can, and should, take action necessary to ensure that the negotiation table between tribes and energy companies is level. The federal government also has an essential role in enforcing agreements that tribes enter into with energy companies. Unfortunately, the federal government's record in this arena is appalling. In light of the Supreme Court's ruling, Congressional action is needed to strengthen the federal government's responsibility to the tribes. The proposed legislation moves in the wrong direction by furthering weakening it.

Finally, a regulatory structure already exists intended to increase both tribes' control of and financial return from mineral development, including oil and gas. Nothing comparable exists for the electricity sector. Improvements are certainly possible in the process governing mineral development. NRDC supports the approach in S. 424 of studying the improvements that can be made to the Indian Mineral Development Act before making legislative changes to oil and gas leasing in Indian Country. The controversy that surrounds oil and gas development should not be allowed to stand in the way of making critical changes to improve development and access to electricity resources in Indian Country.

BEFORE THE UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS
Russell Senate Office Building, Room 485
Washington, D.C., 20510-6450

Statement of Mr. Howard D. Richards, Sr.
Chairman, Southern Ute Indian Tribal Council
March 19, 2003

Chairman Campbell and other members of the Committee on Indian Affairs, it is my honor to appear before you today on behalf of the Southern Ute Indian Tribe to address pending legislation related to Indian energy development. The Southern Ute Indian Reservation is located in southwestern Colorado on the northern portion of the San Juan Basin. Our tribe has aggressively pursued exploration and development of energy resources for several decades, and our success in this area has allowed us to improve the financial security and the quality of life of members of our tribe.

Oil and gas leasing of our lands commenced in the late 1940s, under the supervision of the Bureau of Indian Affairs ("BIA"). For approximately twenty-five years, we held lease sales and issued standard form leases approved by the BIA. Because of concerns that our mineral resources were not being properly managed by the BIA, the Southern Ute Indian Tribal Council imposed a moratorium on future leasing between the years of 1974 and 1984. During that ten year period, a number of important activities took place. First, with financial assistance from the BIA Office of Trust Responsibility, our tribe undertook an independent audit of the royalty computation and payments associated with our leases. That study revealed gross neglect and underpayment by many of our lessees. Our study, along with similar studies undertaken on behalf of other tribes, resulted in enactment of the Federal Oil and Gas Royalty Management Act of 1982. Second, through a combination of self-funding and assistance from the BIA Minerals Division, we began a disciplined evaluation of the leased and unleased resources underlying our lands. In order to conduct this evaluation we hired several non-Indian experts, and we started a tribal energy resource office. Our consultants and employees helped us understand the scope and extent of our resources, and, through their efforts, we established a computerized data base from

which we could generate maps and lease information. Third, Congress passed the Indian Mineral Development Act of 1982, which for the first time authorized tribes to engage in direct negotiation of oil and gas lease contracts.

Armed with improved technical knowledge and a new legislative vehicle for negotiating leases for our lands, we entered into a series of mineral agreements in the 1980s, primarily with major companies or large independents. In our negotiations, we generally included provisions granting the tribe preferential purchase rights or rights of first refusal in the event the leasing company chose to sell or assign its interest to others. Although we have had some disagreements, our relationships with industry representatives have generally been favorable. We have honored our contractual obligations and we expect the companies to do the same. We have worked hard to ensure that companies comply with their lease terms. By the same token, we have demonstrated our willingness to live up to our contractual obligations by including provisions waiving the tribe's immunity from suit needed to interpret or enforce our negotiated agreements. As a result of the successful development of coal seam gas from our lands commencing in the late 1980s, our economy has steadily grown.

Our experiences and the recommendations of our technical staff led us to create a tribally-owned oil and gas company in approximately 1992. The purpose of the company was to acquire ownership of oil and gas leasehold interests on or near the Reservation and, ultimately, to operate wells on behalf of both the tribe and non-Indians. That company, Red Willow Production Company, is currently the fourth largest producer of oil and gas in Colorado. We also learned the importance of establishing sound business relationships with other members of the industry. For example, in 1994, we entered into a partnership with the Stephens Group, from Little Rock, Arkansas, and together purchased one of three major pipeline-gathering systems operating on the reservation and re-named the system "Red Cedar Gathering Company." Through aggressive capital investment, we were able to construct pipeline gathering facilities in strategic locations on the Reservation to enhance production and development. More than 1% of Nation's daily gas supply flows through the Red Cedar system. Today, the Southern Ute Indian Tribe, through a variety of subsidiaries, also holds oil and gas investments in Canada, Montana, Colorado, New Mexico, and Texas. The fair market value of Red Willow and Red Cedar easily exceeds half a

billion dollars.

As a result of our many challenges and successes, we are convinced of several matters that may be helpful to you in your consideration of S. 424 ("Tribal Energy Self-Sufficiency Act") and S. 522 ("Native Amercian Energy Development and Self Determination Act"). First, successful oil and gas leasing requires knowledge of the land and resources involved. Because the federal government does not have the capacity to produce and transmit to tribes the information needed to make sound, timely decisions, tribes must assume a greater and greater role in evaluating and managing their lands. Second, the current leasing systems, including the Indian Mineral Development Act, contain provisions that result in unnecessary delays to development. Tribal land is not public land. Although we recognize that substantive federal environmental laws should generally apply to tribal activities to the same extent that such laws apply to other citizens, we do not understand why a federally-mandated environmental impact statement is required in order for a tribe to lease its lands, when no such statement is required of a private landowner who may be our neighbor. Congress should resist efforts designed to change tribal decision-making into public decision-making. Third, those tribes that are willing and able to proceed without the supervision of the United States will be required to assume greater responsibility for their actions, including their mistakes. Fourth, Congress should protect tribes against the damaging effects of state taxation of tribal energy development.

In conclusion, we have come a long way, and we have every intention of go farther. Our success in energy development has meant improvements in the day-to-day lives of our tribal members. In order to address specific section-by-section issues related to the proposed legislation, we have had our legal counsel prepare separate written testimony on behalf of our tribe. We respectfully request that the written testimony be included as part of the record.

Respectfully submitted,

Mr. Howard D. Richards, Sr.
Chairman, Southern Ute Indian Tribal Council

BEFORE THE UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS
Russell Senate Office Building, Room 485
Washington, D.C., 20510-6450

Maynes, Bradford, Shipps & Sheftel, LLP
Attorneys for the Southern Ute Indian Tribe
March 19, 2003

This statement, which accompanies the Statement of Mr. Howard D. Richards, Sr., Chairman of the Southern Ute Indian Tribal Council, addresses two legislative proposals concerning Indian energy development: S.424 ("Tribal Energy and Self-Sufficiency Act") and S.522 ("Native American Energy Development and Self-Determination Act of 2003"). Both legislative measures would amend Title XXVI of the Energy Policy Act of 1992 (25 U.S.C. 3501 et seq.) and would establish a framework for approaching Indian energy issues. This statement addresses the legislative measures, first, by summarizing and comparing the proposals, and, second, by suggesting additional changes needed to improve the proposals for the benefit of tribes with the potential to produce non-renewable energy resources.

I. S. 424

S.424 proposes the creation of an Office of Indian Energy Policy and Programs within the Department of Energy "to assist Indian tribes in meeting energy education, research and development, planning and management needs." The means of assistance include a competitive grant program for: energy conservation; support for tribal acquisition of energy supplies and services; improvements in tribal electrical generation, transmission or distribution facilities on Indian land; and improvements in development of electrical power transmission facilities located on Indian land. Additionally, a loan guarantee program is proposed that would assist Indian tribes in energy development and in constructing electrical transmission and delivery mechanisms on Indian land. Significantly, the legislation would provide a preference to energy products owned or controlled by an Indian tribe in the course of procurement by a federal agency or department.

S. 424 also contains provisions specifically addressing the leasing of tribal land for

electrical generation, transmission and distribution facilities or for energy processing and refining facilities and the issuance of rights-of-way for such purposes. These provisions specifically would not apply to Regional Corporations or Native Corporations under the Alaska Native Claims Settlement Act. Under these provisions a tribe would be able to issue such a lease or right-of-way without the approval of the Secretary of the Interior if the duration of the instrument does not exceed thirty years and if the instrument is in compliance with tribal regulations approved by the Secretary of the Interior in accordance with requirements enumerated in Section 103 (f). Among other requirements, in order for tribal regulations to obtain Secretarial approval, they must contain provisions for public notification of final approvals and for consultation with State officials regarding off-reservation impacts of the proposed activity. Further, the regulations must contain an environmental review process that not only identifies and evaluates all significant environmental impacts of the proposed action, but also ensures notification to and comment by the public of the proposed action. Even following approval of the tribal regulations, any interested party, after first exhausting tribal remedies, would be permitted to petition the Secretary of the Interior for review of an Indian tribe's compliance with its regulations in approving a lease or right-of-way.

S. 424 contains provisions addressing several other energy related matters. Section 104 would require the Secretary of the Interior to study and report on the impacts of the Indian Mineral Development Act of 1982 ("IMDA"). Section 105 would require the Secretary to engage in a two-year study of potential energy development on Indian reservations and barriers to that development. Section 106 would require improved coordination in federal power marketing between tribes and administrators of the Bonneville and Western Area Power Administrations. Section 107 would establish a feasibility study on the use of wind energy and hydropower generation. The remaining provisions of S. 424 confirm or modify eligibility requirements for grant, renewable energy incentives, and assistance for rural tribal electrification.

II. S. 522

S. 522 also would establish an Office of Indian Energy Policy and Programs within the Department of Energy. Unlike S. 424, however, the grant and loan programs associated with energy resource development under S. 522, would be available not only to Indian tribes, but also

to "tribal consortia, "defined as "an organization that consists of at least 3 entities, 1 of which is an Indian tribe." Grants and loans under S. 522 would also appear to be available to a broader spectrum of energy-related activities than under S. 424. Eligible activities would include those associated with "vertical integration of energy resources," though the definition of the term is imprecise.

S. 522 also contains provisions dealing with the leasing of tribal lands. In addition to the purposes described in S. 424 (electric and energy processing), S. 522 purposes expressly include leasing for energy exploration and development. Correspondingly, the purpose for tribe's grant of a rights-of-way over tribal lands under S. 522 is expanded to include pipeline rights-of-way. Under both proposals, however, a tribe's power to grant leases or rights-of-way without approval by the Secretary of the Interior, is limited to instruments not exceeding 30 years and is limited to those circumstances in which a tribe's regulations have been approved by the Secretary of the Interior. The requirements for obtaining the Secretary's approval of tribal regulations under S. 522 are virtually identical to those set forth in S. 424.

Unlike S. 424, S. 522 would create an twenty-member Indian Energy Resource Commission that would develop proposals on a list of critical matters affecting Indian energy development, including issues involving dual State and tribal taxation. S. 522 would also require review by the Secretary of Housing and Urban Development and the Secretary of the Interior of ways to promote greater energy efficiency in Native American housing. Additionally, S. 522 would require the Secretary of the Interior to review and report on IMDA activities and for both the Secretaries of Interior and Energy to report on barriers to Indian energy development.

III. Tribe's Recommendations

A. General Scope.

The provisions of S. 522 that address loans, grants, and tribal-issuance of leases and rights-of-way are broader in scope than those of S. 424. In that regard, S. 522 would provide greater assistance to tribes that desire to develop non-renewable resources on their lands. The Southern Ute Indian Tribe would, however, encourage the inclusion of the Indian energy preference provisions proposed by Section 101 of S. 424 (Section 2607(d) amended Energy

Policy Act of 1992) in any Indian energy legislation ultimately adopted.

B. Tribal Regulations and Secretarial Approval.

The leasing and right-of-way proposals of both legislative measures propose a trade-off that may be unacceptable even to those tribes with established energy development programs. Essentially, the measures propose the elimination of Secretarial approval in exchange for the promulgation of tribal regulations that not only require consultation with State officials, but also require public notification and comment processes, and, ultimately, private citizen challenges of approved leases or rights-of-way based on allegations of non-compliance with tribal regulations. Traditional notions of tribal sovereignty would protect tribes against the incursion of State governments or the views of non-members in the process of tribal decision-making. To ask tribes to forsake such a fundamental aspect of sovereignty in exchange for the elimination of Secretarial approval, may simply be too much for most tribes.

We believe the requested trade-off is the wrong approach. Instead, Congress should be concerned that tribes desiring to develop resources without Secretarial approval are capable of making informed decisions and are willing to accept the consequences of their decisions. Toward that end, an alternative legislative approach follows:

SEC. ____ SECRETARIAL DETERMINATION OF MANAGEMENT CAPACITY

(A) Regulations and Application considerations. *Within 180 days of enactment of this Act, the Secretary of the Interior shall adopt regulations permitting any federally recognized Indian tribe to apply to the Secretary for a determination that the applying tribe has the capacity to enter into leases and other agreements, including any "Minerals Agreement" as defined in section 3(a) of the Act of December 22, 1982, Public Law 97-382, without the necessity of approval of such agreements by the Secretary of the Interior, the Assistant Secretary of the Interior for Indian Affairs, or their authorized delegates. Among other factors to be considered in making the determination of capacity, the Secretary shall consider:*

(a) the historical experience of the tribe in entering into mineral leases and other related agreements;

(b) whether the tribe has established an internal department or division with designated responsibility to assist in the negotiation of or the monitoring of compliance with the provisions of mineral leases or other related agreements;

(c) the technical expertise of individuals appointed by or employed by the tribe in the internal department or division;

(d) the retention by the tribe of legal counsel with experience or expertise in matters involving mineral leasing;

(e) other factors identified by the Secretary indicative of the applying tribe's capacity to make prudent decisions with respect the development of its mineral resources.

(B) Application process. *Following adoption of the regulations establishing the application process, those Indian tribes so choosing shall be permitted to submit applications described in this Section. Within ninety days of submission of any such an application, the Secretary shall issue a written determination to the applying tribe either recognizing or not recognizing the capacity of the tribe to enter into mineral leases and other related agreements without the approval of the Secretary of the Interior. The Secretary shall provide written findings supporting either a positive or negative determination; however, the determination by the Secretary shall not appealable or subject to judicial review. Between the date of receipt of a tribal application and the date of determination, the Secretary may request from an applying tribe such additional information in support of a favorable determination as deemed necessary by the Secretary. Receipt of a negative determination by a tribe shall not preclude that tribe from submitting subsequent applications seeking a positive determination.*

SEC. ____. EFFECT OF SECRETARIAL DETERMINATION

Any tribe receiving a favorable determination of capacity shall be authorized, subject to

any limitation or provision contained in its constitution or charter, to enter into binding mineral leases or other related agreements without the necessity for additional review or approval by the Secretary. Such an Indian tribe may continue to seek advice, assistance, and information from the Secretary during and after the negotiation process, which shall be provided to the extent allowed by available resources.

(A) No Form Prescribed. *Any such lease or other related agreement to which an Indian tribe is a party shall be in writing and, to the extent determined applicable by the parties thereto, shall address:*

(1) the identity of the parties to the lease or agreement; the legal description of the lands, including, if applicable, rock intervals or thicknesses subject to the lease or agreement; and the purposes of the lease or agreement;

(2) the duration of the lease or agreement;

(3) indemnification of the Indian tribe and the United States from all claims, liabilities and causes of action that may be made by persons not a party to the lease or agreement;

(4) the obligations of the respective parties;

(5) methods for disposition of production;

(6) methods of payment and amount of compensation to be paid;

(7) accounting and mineral valuation procedures;

(8) operating and management procedures;

(9) limitations on assignment of interests, including preferential rights;

(10) bond requirements;

(11) insurance requirements;

(12) audit procedures;

(13) dispute resolution;

(14) force majeure matters;

(15) termination or suspension procedures;

(16) abandonment, reclamation and restoration activities;

(17) production and sales reporting requirements;

(18) unitization, communitization, and conservation and efficient utilization measures;

(19) drainage and diligence;

(20) record keeping;

(21) taxation.

In addition, the mineral lease or other agreement may incorporate regulations, including reporting, auditing and enforcement procedures, of the Bureau of Indian Affairs, the Bureau of Land Management, and the Minerals Management Service, or their successor agencies, to the same extent that such incorporation would otherwise be permissible under the Act of December 22, 1982, Public Law 97-382, and the regulations implementing that Act.

(B) Submission to Bureau of Indian Affairs. *The executed mineral lease or agreement, together with a copy of the tribal governmental resolution authorizing tribal officers to execute the same, shall be forwarded by the tribe to the appropriate Superintendent of the Bureau of Indian Affairs, or in the absence of a Superintendent, to the Area Director, and shall be maintained as a record of that agency. Notwithstanding any other law, all projections, studies, data or other information possessed by the Department of the Interior regarding the terms and conditions of a mineral lease or other agreement entered into under the provisions of this Act, the financial return to the Indian tribe, or the extent, nature, value or disposition of the Indian mineral resources, or the production, products or proceeds thereof, shall be held by the Department of the Interior as privileged proprietary information of the affected Indian tribe.*

(C) Nonliability of United States; continuing obligations. *The United States shall not be liable for losses sustained by a tribe under any mineral lease or other related agreement entered into pursuant to this Act; Provided, That the Secretary shall continue to have a trust responsibility to ensure that the rights of a tribe are protected in the event of a violation of the terms of any such lease or agreement by any other party to such lease or*

agreement; Provided further, That, except as otherwise provided herein, nothing in this Act shall absolve the United States from any responsibility to Indians, including those which derive from the trust relationship and from any treaties, Executive orders, or agreement between the United States and any Indian tribe.

(D) Regulations regarding duration of determination. *The Secretary, after consultation with national and regional Indian organizations and tribes with expertise in mineral development, shall promulgate rules governing the conditions under which a determination of capacity may be reviewed and revoked. No revocation of a determination of capacity shall serve to invalidate a mineral lease or other agreement entered into pursuant to the provisions of this Act.*

C. Applicable Environmental Laws.

As a general matter, tribal governments do no oppose application of general federal environmental laws in Indian country. In fact, many tribes have accepted congressionally-authorized opportunities to participate actively in the development of tribal environmental programs. We do not, however, understand the rationale that supports the mutation of tribal lands use decisions into decisions affecting public lands. Specifically, the application of the National Environmental Policy Act ("NEPA") review and public comment processes to Indian energy development decisions appears to inconsistent with the internal decision-making aspect of tribal sovereignty and contrary to the confidentiality protections afforded by IMDA. The Southern Ute Indian Tribe proposes clarification of this issue as follows:

SEC. ____. COMPLIANCE WITH OTHER LAWS.

(A) Non-applicability of National Environmental Policy Act. *Unless otherwise provided by the parties to a mineral lease or other related agreement entered into under the authority of this Act, the execution and performance of such a lease or agreement shall not be subject to section 102(2)(C) of the National Environmental Policy Act of 1969.*

(B) Amendment to Act of December 22, 1982. *The Secretary's review and approval of any Minerals Agreement entered into pursuant to the Act of December 22, 1982, Public Law 97-382, or the Secretary's review and approval of any other mineral lease issued under any other federal law authorizing the leasing of the minerals of an Indian tribe or of an Indian allottee shall not be considered a Federal action within the meaning of that term in section 102(2)(C) of the National Environmental Policy Act of 1969.*

(C) Application of other laws. *In implementing the provisions of any mineral lease or other related agreement entered into pursuant to this Act, and except as provided in Sections 5(A) and 5(B), above, the provisions of other Federal laws, including laws designed to protect the environment, historic sites, and archeological resources, shall apply to the same extent that such laws would have otherwise applied had Secretarial approval of such lease or agreement been obtained under the Act of December 22, 1982, Public Law 97-382. Nothing in this Act shall affect, nor shall any mineral lease or other related agreement entered into pursuant to this Act, be subject to or limited by, the Act of December 22, 1982, Public Law 97-382, or the Act of May 11, 1938, 52 Stat. 347. Nothing in this Act shall impair any right of an Indian tribe organized under section 16 or 17 of the Act of June 18, 1934, as amended, to develop their mineral resources as may be provided in any constitution or charter adopted by such tribe pursuant to that Act.*

D. Taxation

One of the most contentious issues in Indian country relates to dual taxation of tribal development activities. As a result of the Supreme Court's Cotton Petroleum decision, both State and tribal governments possess the authority to tax the severance of minerals produced by lessees from tribal lands. This circumstance creates a disincentive to production of tribal lands. The Southern Ute Indian Tribe recommends that some prospective solution be adopted that would exempt future Indian energy resource development from State taxation. Proposed language toward that end follows:

State Taxation. *In the absence of the express written consent of the governing body of an*

affected Indian tribe:

(i) *no interest in or activity undertaken under a mineral lease or other agreement entered into pursuant to this Act shall be subject to taxation by any State or local subdivision thereof;*

(ii) *no interest in or activity undertaken under a mineral lease or other agreement entered into after the date of enactment of this Act pursuant to any other law authorizing the leasing of lands of a tribe or of an individual Indian allottee shall be subject to taxation by any State or local subdivision thereof; and*

(iii) *no production or severance of minerals attributable to a mineral lease or other agreement entered into by an Indian tribe or individual Indian allottee and obtained from or associated with a well, mine or other facility located within the boundaries of an Indian reservation, the drilling or construction of which is commenced after the date of enactment of this Act, shall be subject to taxation by any State or local subdivision thereof.*

Any Indian tribe having received a determination of capacity under this Act and any State in which lands subject to this Act are located may enter into intergovernmental agreements allowing State taxation of interests in mineral leases or agreements entered into under this Act in exchange for the provision of State services desired by the tribe related to matters involving the performance or monitoring of such leases or agreements.

E. Nonintercourse Act Revisions.

Both proposals, as well as a myriad of other statutes affecting Indian tribes, tie its applicability, in part, to lands, "subject to a restriction by the United States against alienation." This oft-repeated legislative phrase finds its roots in 25 U.S.C. §177, which states, in part, as follows:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

On its face, the statute makes no distinction between lands held in trust by the United States or

lands held in fee by Indian tribes. The literal language is expansive, and courts have wrestled with its meaning in a variety of contexts, often with different results. The current language was enacted as Section 12 of the Trade and Intercourse Act of 1834, but has not changed materially since its initial form in 1790. See Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 241 n.9 (1985); Lummi Indian Tribe v. Whatcom County, Washington, 5 F.3d 1355, 1358 (9th Cir. 1993). At the time of its passage, the Nonintercourse Act probably was intended to apply to aboriginal title, however, the Supreme Court's rationale in United States v. Sandoval, 231 U.S. 28 (1913), applying federal liquor laws to Pueblos, was interpreted by Congress as suggesting that the Nonintercourse Act might also apply to lands held in fee by Indian tribes. See, e.g. Alonzo v. United States, 249 F.2d 189, 196 (10th Cir. 1957). In order to avoid the costs of endless litigation, and in order to foster tribal economic development on and off reservations, Congress should confirm that the Nonintercourse Act is not intended to apply to interests in lands obtained by tribes in fee for investment or other commercial purposes, unless those real property interests are subsequently placed into trust status.

Several hypothetical (and not so hypothetical examples) of how the uncertain scope of the Nonintercourse Act works to tribes' disadvantage might be helpful.

> *Example 1.* An Indian tribe's reservation was allotted under the General Allotment Act, and the balance of reservation land was patented under the homestead laws. Previous litigation has confirmed the continued existence of the exterior boundaries of the reservation. The successors to Farmer Jones, a non-Indian patentee, sell the Farmer Jones' on-reservation fee patent to the Indian tribe. May the tribe subsequently sell the parcel in compliance with the Nonintercourse Act, without an act of Congress?
>
> *Answer:* Perhaps. Property obtained under homestead laws is freely alienable. When Congress patented the land to Farmer Jones, restrictions on alienation were lifted. This answer, however, does not alter the express language of the Nonintercourse Act, and this question was left unanswered in one relatively recent

case in which it was raised. See Leech Lake Band of Chippewa Indians v. Cass County., Minnesota, 108 F.3d 820, 826 n.8 (8th Cir. 1997).

Example 2. Same example as above, but the parcel was acquired by the Indian tribe in fee from an allottee.

Answer: Same. The Supreme Court has held that the patenting in fee of an allotment under the General Allotment Act, as amended by the Burke Act, rendered the allotment alienable, and, thus, taxable. County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992). The Court did not, however, address the question of the Yakima Nation's capacity to sell the fee tract in light of the Nonintercourse Act.

Example 3. A progressive Indian tribe has established its own unincorporated oil and gas company, which operates as an extension of the tribe. In the 1950s the tribe leased its lands for oil and gas purposes under the Indian Mineral Leasing Act of 1938, and those trust lands continue to be administered by the BIA. One of the companies has experienced financial difficulties, and has assigned its working interests in tribal oil and gas leases to the tribe. The BIA properly approved the lease assignments to the tribe; however, the existence of overriding royalties previously issued by the company to third parties has prevented a merger of title. The tribe has substantially improved the operations of the property, but tribal members have insisted upon greater per capita distributions. May the tribe sell through assignment the working interests in trust oil and gas leases under the assignment provisions of the Indian Mineral Leasing Act regulations, or does the tribe's acquisition of such interests subject them to new Nonintercourse Act restrictions requiring an act of Congress.

Answer: The land is trust land, subject to restrictions against alienation. The working interests were created pursuant to an act of Congress authorizing mineral

leasing, and the regulations implementing the act authorize alienation through assignments. Presumably, the tribe's ability to assign is no less than the predecessor oil company; however, the language of the Nonintercourse Act is expansive. Without an authorizing act of Congress to sell the working interests, the tribe may not be able to sell its working interests.

Example 4. Same as above before the acquistion. In order to purchase the working interests in the tribal leases, the tribe chooses to finance the acquisition through a commercial loan with one of the country's top banks. The bank requires an assignment of security interests in the tribe's to-be-acquired working interests, which would conditionally convey the working interests to the bank in the event of loan default by the tribe. The tribe's attorney discloses the existence of the Nonintercourse Act to the bank, whose counsel reads its provisions literally. Unless Congress passes a law authorizing the issuance of security interests by the tribe, the bank will decline to extend credit to the tribe. Is an act of Congress required?

Answer. As a practical matter, it probably makes no difference whether legislation is legally required or not. Unless there is some other act on the books that specifically authorizes the tribe to convey interests in reservation real property, the loan will probably not be issued.

Example 5. A progressive tribe chooses to purchase the assets of an oil and gas company, whose leasehold interests include working interests in tribal oil and gas leases, and working interests in off-reservation fee properties near the tribe's reservation, working interests in off-reservation fee properties located in several other states. The sale of all assets is an important strategic decision of the company, and the tribe wants to quickly sell those off-reservation assets because its principal objective is to expand its on-reservation business activities. Is the tribe authorized under the Nonintercourse Act to sell the off-reservation assets?

Answer: Perhaps.

Obviously, the examples could go on forever. There are also several alternatives for tribes confronted with these situations. A tribe could, for example, create a wholly-tribally owned corporation under state law to hold and sell the interests. Should the corporate veil be pierced, however, the tribe may be left with no exit strategy. Additionally, the state created corporation would arguably be subject to state and federal taxation, even for the on-reservation acquisitions. Fundamentally, however, the imprecision of the Nonintercourse Act impedes the ability of tribes to make normal investment decisions on and off of reservations that are critical to economic growth.

The difficulties surrounding the scope of the Nonintercourse Act are compounded in the legislative mechanisms authorizing mineral leasing of tribal lands, including IMDA. Those acts generally define Indian lands as those that are subject to restrictions against alienation. Without clarification of the scope of 25 U.S.C. § 177, each of the authorizing acts proliferates uncertainty as to its applicability.

Conclusion

These comments should demonstrate that the Southern Ute Indian Tribe shares the the Committee's concern and sense of importance about these legislative matters. The Tribe appreciates the opportunity to comment and offers its support to the Committee in its important work.

Indian-Affairs, Testimony (Indian Affairs)

From: Robert Shimek [rshimek@ienearth.org]

Sent: Friday, April 04, 2003 8:10 PM

To: Indian-Affairs, Testimony (Indian

Subject: S. 424 and S. 522

To all the Distinguished Members of the U.S. Senate Committee on Indian Affairs.

My name is Robert Shimek and I am the Special Projects Coordinator for the Indigenous Environmental Network headquartered in Bemidji, MN. I wish to register some comment and concern related to S. 424 and S.522.

First of all, I wish to applaud your efforts more closely examine the issues related to energy development in Indian Country in the U.S. As stated in S. 522, there is much there worthy of looking at. The only comment that I wish to make about specifis provisions at this time is that S. 522, Sec. 2601 makes referance to specific quantities of non-renewable energy resources on Indian Land, but only makes general referance to quantities of wind resources in the Great Plains area. To ensure that wind energy resources in Indian Country are properly addressed, I would request that a more comprehensive analysis of wind energy resources on Tribal land be stated in the proposed legislation.

The remainder of my comments will be about both peices on legislation in general. First of all, Tribal soverienty and self deteremination are critical components of any legislation affecting Indian Country today. The Trust Responsability of the U.S. Government is not something to be overlooked or diminished in this process. Treaties between thee U.S. and Tribes reserved land that contained certain features and characteristics that were and still are important to Tribes and Tribal People. Protection of the land and the Indian People has always been at the fore front of U.S. Trust Responsability. Environmental protection is part of this scenario.

Both of these peices of legislation identify appropriations for the development on energy resources in Indian Country. Development or application of environmental protection laws are also provisions in the proposed legislation. Whether it is development or application of environmentel protection laws, several ideas need further development for the protection of the land and the People. If a Tribe is to develop it's own environmental protection, adequate funding needs to be provided. If this development is included in existing appropriations, it needs to be stated so clearly. If environmental protection is outside of proposed approptiations, additional funding needs to be added specifically for environment protection. On the front end of any energy development, Tribes need to be able to gather baseline data on air and water quality, endangered species, wild food and medicinal plants, and spiritual and other cultural resources. On the production or extraction end, Tribes need to be able to moniter environmental conditions, set compliance standards, and take enforcement actions. If a tribe is unable to do that because of inadequate separation of powers, no federal funding should be advanced to a tribe until a system of checks and balances is in place at the Tribal Government level. Nowhere in this legislation should U.S. Government trust responsibility be explicitly or implicitly diminished.

Thank you for the opportunity to comment on this important legislation.

Robert Shimek
Indigenous Environmental Network
P.O. Box 485
Bemidji, MN 56619

State of New Mexico

Office of the Governor

Bill Richardson
Governor

March 13, 2003

Via Facsimile & U.S. Mail
Honorable Ben Knighthorse Campbell
380 Russell Senate Office Building
Washington, D.C. 20510

Honorable Daniel K. Inouye
722 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Campbell and Vice-Chairman Inouye:

As Governor of New Mexico, a state with a large population of Native Americans, and as the former Secretary of Energy, I am writing to express my support for S. 424, a bipartisan bill introduced by Senator Bingaman to improve energy development and utilization opportunities for Native Americans. I ask that this letter be included in the Committee's hearing record on S. 424.

During my tenure as the Secretary of Energy, I supported an active tribal energy program to assist Indian tribes across the country move towards energy self-sufficiency—an important step in improving the economic conditions on many Indian reservations. A priority in this effort was assessing and supporting opportunities for renewable energy development within Indian country. Given the location of many reservations and the basic lack of infrastructure, renewable energy development holds significant promise in helping tribes develop sustainable homeland economies.

S. 424 represents an opportunity to increase the federal assistance available to Native Americans in an area where there is both a great need and opportunity–something entirely consistent with the federal trust responsibility. The bill would expand the Department of Energy's existing authorities, including the creation of a new office of Indian Energy Policy and Programs. I believe this is an important step to ensuring long-term stability and support for a Tribal energy program that can produce meaningful results that improve the quality of life on Indian reservations across the country. This is especially important in my state where 37% of the households (approximately 18,000 homes) on the Navajo reservation do not have access to electricity. Other reservations within New Mexico have similar needs.

S. 424 also promotes tribal sovereignty and self-determination by allowing tribes to take responsibility for approving leases and rights-of-way for certain energy-related facilities on tribal lands. This responsibility is balanced with a requirement that tribes fully evaluate and seek input from the public at large on any potential environmental impacts associated with these facilities. Finally, there are a number of grant programs and study provisions within the bill that should help ensure continued responsible development of the resources available to tribes on their land.

I understand that the great majority of S. 424 was widely supported during the House-Senate energy bill conference during the 107th Congress. Given that support, I hope that Congress can act quickly on this bill. I also am informed that the Committee will be considering S. 522, a bill introduced by Senator Campbell to address Indian energy needs. While I am not familiar with the details of that bill, I applaud any effort to craft a responsible and productive Indian energy bill that will benefit and improve the lives of Native Americans well into the 21st century.

Sincerely,

Bill Richardson
Governor of New Mexico

cc: Honorable Jeff Bingaman
Committee on Indian Affairs, U.S. Senate

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